Supreme Court, U.S.
FILED

95 1229 JAN 31 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

STEVE KNIGHT, JR. D/B/A STEVE KNIGHT STEEL FABRICATORS AND STEVE MARK KNIGHT, AS THE ADMINISTRATOR OF THE ESTATE OF WILLIE STEVE KNIGHT, JR.,

Petitioners,

vs.

UNITED STATES FIDELITY & GUARANTY INS. CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRAGG E. WILLIAMS, III
JOSEPH H. MONTGOMERY
Counsel of Record
WILLIAMS, WILLIAMS & MONTGOMERY
P. O. Box 113
Poplarville, MS 39470-0113
(601) 795-4572

WILLIAM L. DENTON
Counsel of Record
P. O. Box 1204
Biloxi, MS 39533-1204
(601) 374-8722

Counsel for Steve Knight

January 30, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

146pp

QUESTIONS PRESENTED

1. Whether a motion for summary judgment for the insurer is proper where there is conflicting objective evidence supporting a reasonable inference of "bad faith" withdrawal by a liability insurer from the defense of its insured.

2. Whether this Court should exercise its supervisory function where the trial court and the court below have failed to follow established Mississippi substantive law in holding that the refusal of an insurer to continue a defense of its insured is in "good faith" based solely on a purported arguable reason to support that denial of a defense, where there has been an unqualified assumption of the defense by the insurer and invoking of the cooperation clause, an inadequate investigation of the facts relevant to coverage, a conflict of interest of insurer's agents and attorneys with the insured's interest, and prejudice to the insured by the conduct of the defense.

LIST OF PARTIES

Rev. William Buice	Plaintiff/Appellant #94-60384
Logan & Bise	Attorneys for Plaintiff/Appellant #94-60384
Steve Knight	Plaintiff/Appellant #94-60861 Plaintiff/Appellee #95-00029
William L. Denton, Esq.	Attorney for Steve Knight
Joseph H. Montgomery, Esq.	Attorney for Steve Knight
Williams, Bragg E. III	Attorney for Steve Knight
United States Fidelity & Guaranty Ins. Co.	Garnishee Defendant/Appellee #94-60384 Defendant/Appellee #94-60681
Brown & Watt	Attorneys for USF&G
Chicago Insurance Company	Garnishee Defendant/Appellee #94-60384 Defendant/Appellant #95-00029
Butler, Snow, O'Mara, Stevens and Cannada	Attorneys for Chicago Ins. Co.
Burt Young d/b/a Crystal Springs Insurance Agency	Agent for USF&G
F.W. Williams Company	Representative for USF&G (Acquired by USF&G in 1982)
Williams Marketing Company	Surplus lines broker for USF&G

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Opinions Below 1

Jurisdiction 1

Rules Involved 2

Statement of the Case 2

Reasons for Granting the Writ 15

1. The decision below conflicts with the decisions of this Court, the decisions of the Court below and the decisions of other courts of appeal under Rule 56 F.R.C.P., where there are material facts supporting conflicting reasonable inferences of the "good faith" of a liability carrier in its withdrawal from the defense of its insured 15

2. The decision below conflicts with the decisions of the Mississippi Supreme Court defining the factual circumstances under which a liability carrier breaches its duty to defend its insured by withdrawing from a defense of its insured 19

   a. The allegations of the Complaint compelled a defense of Knight by USF&G 19

   b. The unqualified defense by USF&G prejudiced Knight 21

   c. USF&G failed in its duty to conduct an adequate investigation 23

TABLE OF CONTENTS – Continued

Page

d. USF&G did not raise an "arguable reason" under the non-owned vehicle endorsement until it responded to Buice's second motion for summary judgment..... 25

e. USF&G's attorney and claims adjusters had a conflict of interest in defending Knight while evaluating a coverage defense for USF&G .. 27

f. Summary of the evidence of USF&G's bad faith 28

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

Aetna Life & Cas. Co. v. Lavoie, 470 So.2d 1060 (Ala. 1985) 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....16, 17

Audubon Ins. v. Terry Road Wine & Liquor, 875 F.Supp. 1243 (S.D.Miss. 1995) 19, 22

Bankers Life & Cas. Co. v. Crenshaw, 483 So.2d 254 (Miss. 1986) 25, 26

Burnham Shoes, Inc. v. West American Ins. Co., 504 So.2d 238 (Ala. 1987)..... 22

Corwin v. Marney, Orton Investments, 843 F.2d 194 (C.A. 5th 1988)..... 18

Craft v. Economy Fire & Casualty Co., 572 F.2d 565 (C.A. 7th 1978)..... 24

Employers Reinsurance v. Martin, Gordon & Jones, 767 F.Supp. 1355 (S.D. Miss. 1991).....19, 22

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)..... 29

Fidelity & Cas. Co. of New York v. Riley, 380 F.2d 153 (C.A. 5th 1967)..... 22

First National Bank of Jackson v. Pursue Energy Corp., 799 F.2d 149 (C.A. 5th 1986) 18

Fishbach and Moore, Inc. v. Cajun Electric Power Cooperative, Inc., 739 F.2d 194 (C.A. 5th 1986) 17

TABLE OF AUTHORITIES – Continued

Page

Fortress Re, Inc. v. Central National Insurance Co. of Omaha, 766 F.2d 163 (C.A. 4th 1985) 24

Hartford Acc. & Ind. Co. v. Foster, 528 So.2d 255 (Miss. 1988) 27

Henderson v. USF&G, 620 F.2d 530 (C.A. 5th 1980) 26

Honore v. Douglas, 833 F.2d 565 (C.A. 5th 1987) 17

Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) 17

Leonard v. Dixie Well Service and Supply Co., 828 F.2d 291 (C.A. 5th 1987) 17

Mavar Shrimp & Oyster Co. v. USF&G, 187 So.2d 871 (Miss. 1966) 23

Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 17

Meyers v. M/V Eugenio C, 842 F.2d 815 (C.A. 5th 1988) 17

Nat. Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d 488 (W.Va. 1987) 22

Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931 (C.A. 4th 1991) 24

Reserve Life Ins. Co. v. McGee, 444 So.2d 803 (Miss. 1984) 26

Rhodes v. Chicago Ins. Co., 719 F.2d 116 (C.A. 5th 1983) 19

TABLE OF AUTHORITIES – Continued

Page

Southern Farm Bur. Cas. Ins. Co. v. Logan, 239 Miss. 580, 119 So.2d 268 (1960) 19, 20, 21

Southern Natural Gas v. Pursue Energy, 781 F.2d 1079 (C.A. 5th 1986) 18

State Farm Mutual Auto Ins. Co. v. Taylor, 233 So.2d 805 (Miss. 1970) 19, 23

Stonewall Ins. Co. v. Cooke, 165 Miss. 619, 144 So. 217 (1932) 22

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633 (C.A. 5th 1985) 17

Transamerica Ins. Group v. Chubb & Sons, Inc., 554 P.2d 1080 (Wash. App. 1976) 27

USF&G v. Yost, 183 Miss. 65, 183 So. 260 (Miss. 1938) 22

OTHER AUTHORITES

Handbook on Insurance Coverage Disputes, Sec. 5.02(a)(2)(A) 19

Rule 56 F.R.C.P. 2, 15, 16

Petitioner, Steve Knight, Jr., d/b/a Steve Knight Steel Fabricators and Steve Mark Knight as the Administrator of the Estate of Willie Steve Knight, Jr., (hereinafter "Knight"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 21, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 65 F.3d 34, and is reprinted in the Appendix hereto, App.1, infra.

The decision of the United States District Court for the Southern District of Mississippi, is reprinted in the Appendix hereto, App.10, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sec. 1332, the Petitioner brought this suit in the Southern District of Mississippi. On November 30, 1994, the Southern District entered an order granting respondent's motion for summary judgment.

On petitioner's appeal, the Fifth Circuit on September 21, 1995, entered its judgment and opinion affirming the Southern District of Mississippi judgment. App.1, infra. A petition for rehearing was filed and the Fifth Circuit entered an order denying the petition on November 2, 1995. App.38, 39, infra.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

RULES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment.

The full text of the rule is reprinted in the Appendix, App.40, infra.

STATEMENT OF THE CASE

1. Introduction of the Principal Parties

Petitioner, Steve Knight, Jr., was the owner of a business enterprise known as Steve Knight, Jr. Steel Fabricators, Inc., located at Port Bienville Industrial Park, Hancock County, Mississippi. Knight's steel fabricating operations covered barge repair, fabrication, and painting. Knight also operated a gravel pit in Nicholson, Mississippi.

Respondent, USF&G is an insurance company that issues policies of insurance in Mississippi through its authorized agents. Burt Young (hereinafter "Young") owned and operated the Crystal Springs Insurance Agency, an authorized USF&G agency. Knight obtained his insurance coverage for his business pursuits through Young and Crystal Springs Insurance Agency. Young provided all Knight's business insurance.

Knight employed Gary Brock to work for him at both the Nicholson and Port Bienville sites. On July 6, 1984, Gary Brock, returning to Port Bienville to meet and tie up barges as per the instructions of Knight, veered across the center line of Highway 90, and struck the vehicle driven by Mary Virginia Buice, killing her. The Administrator of the Estate of Mary Virginia Buice (hereinafter "The Estate") is her father, Rev. William Ramsey Buice.

2. Insurance Coverage for Knight

Knight required extensive business coverage in order to meet the contract requirements of his large corporate clients, such as Lykes Barge Lines and Avondale Shipyard. T.113-115, 186-188. Young provided Knight with a Business Auto Policy #041146688 (BAP), a Trucker's Policy #026084300, and a Commercial General Liability Policy #025165294 (CGL), from USF&G, all of which were in effect on the date of the accident in question. R.1252. Knight had two other USF&G policies that are not at issue here.

USF&G's BAP provided coverage limits of $500,000 for specifically described motor vehicles, as well as a non-owned vehicle endorsement entitled "JXN 154-B":

> "It is agreed that the unqualified word 'insured' wherever used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission."

> "Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used solely for business purposes in connection with your business."

Ex.P-1 at 15. The terms of this endorsement were authored by the Jackson office of USF&G.

Knight sold Brock the pickup truck which was involved in the accident in May of 1984. T.58. Brock financed the purchase through a bank, and the note was co-signed by Knight. *Id.* Brock used the vehicle on the job, and in fact, the accident investigator assumed that Knight was the owner of the vehicle. See Ex.8 to May 25, 1990, hearing to determine damages. The pickup truck involved in the accident was specifically endorsed off of the Steve Knight, Jr. Business Auto Policy on June 1, 1984, more than a month before the accident.

3. Facts of the Accident of July 6, 1984.

On July 6, 1984, Gary Brock worked for Steve Knight, Jr., Steel Fabricators, Inc., as a night watchman, mechanic, painter, blaster, and gravel pit operator. T.47-48, 66. One of his duties required that he meet barges that would be repaired or refurbished by Knight's business, and tie them up. *Id.* The testimony was uncontradicted that due to the nature of his duties, Brock was on call 24 hours a day. T.48, 66. Brock often stayed in Slidell on weekends, unless he had to be on the job. T.94. Knight paid Brock $8.00 per hour. He also provided Brock a trailer on the premises of the steel fabrication operation in which to live at no charge. T.49, 57. Friday, July 6, 1984, Brock

worked at Knight's gravel pit in Nicholson, Mississippi. At the end of the day, he drove to the Port Bienville site in Pearlington, Mississippi, to pick up his paycheck, at which time, Steve Knight informed him that Lykes barges would be arriving late that night, and Brock would need to be there to tie them up. T.50, 93-94. Knight gave Brock permission to go to Slidell, Louisiana, for dinner but directed him to come back to Pearlington to meet the barges. *Id.* On his way to dinner, Brock stopped at a friend's house to take her to dinner with him, but she was not at home. Brock then proceeded to a restaurant, where he ate and had a beer. T.50-51. After dinner, Brock stopped at a Time Saver Store and purchased two more beers, and then proceeded back to Pearlington. *Id.* On the way back to Pearlington to meet the barges he struck the vehicle driven by Mary Buice. T.51, 119, 338-339; Ex.D1-40 at 3. Brock was subsequently determined to be intoxicated, and was charged with manslaughter. He was tried on the charge and acquitted.

4. Report of the Accident to the Insurance Agent

The next day, Steve Knight informed Glenda Hunnicutt, his secretary, about the accident, and instructed her to report the accident to his agent, Burt Young, on Monday morning. T.67, 101. On Monday, Ms. Hunnicutt telephoned Burt Young at Crystal Springs Insurance Agency. *Id.* Hunnicutt first informed Gae Powell, Young's office manager, that Brock had been involved in the fatality on the previous Friday, and that Knight had instructed her to contact Young. She spoke then with Young and told him the same thing. T.68. Neither Powell nor Young

asked Ms. Hunnicutt whether Brock was "on the job" when the accident occurred. T.76.

5. Lawsuit Against Knight

The Buice Estate filed suit against Steve Knight, Jr. Steel Fabricators, Inc. and Time Saver Stores, Inc., on August 17, 1987. R.1.[1] On April 21, 1988, counsel for the Buice Estate wrote to Burt Young and enclosed a copy of the complaint against Knight. The letter stated that counsel for Plaintiff had learned of liability coverage for Knight by USF&G and suggested that USF&G be notified. Young notified USF&G.

When Steve Knight was served, he forwarded the suit papers on to his agent, Burt Young. Young received those papers on April 27, 1988, and he in turn sent those on to USF&G the same date, one notice for each of the three applicable USF&G policies. Ex.D1-14, -15, -17.

6. USF&G's Defense of Knight

USF&G retained attorney, Stanford Morse to represent its insured, Knight. On July 15, 1988, Morse acknowledged receipt of the claim file from USF&G. App.82 On August 12, 1988, Stanford Morse filed an Answer on behalf of Steve Knight, Jr., Steel Fabricators, Inc. R.118. Morse's answer for Knight admitted that Brock was negligent, but denied that Brock was acting in the course and

---

[1] Time Saver Stores, Inc., was eventually dismissed prior to the Entry of Default against Defendants Knight.

scope of his employment at the time of the accident. R.118, 119. On that same date, Morse wrote Knight:

> Dear Mr. Knight:
>
> *USF&G has employed us to defend the above referenced case on your behalf. Its policy of insurance requires the insured to cooperate and assist the insurer in the defense of this case.* Your failure to do so may result in no obligation to defend the case and to indemnify you for any judgment rendered by the Court within the limits of liability of the policy.
>
> Our review of the file indicates that it is highly unlikely that Gary Brock was on any mission for your company at the time of the accident. However, this defense has to be proven and your assistance is absolutely essential. App.84, Ex.D1-20; T.334, 335. Emphasis added.

Neither USF&G nor Morse ever communicated to Knight that there was a question of coverage, or that he was being defended under a "reservation of rights or non-waiver agreement". USF&G did not advise Knight that he was being sued in excess of his policy limits. T.290-291.

7. USF&G Claim Investigation

On August 15, 1988, the date that the answer was filed, Darwin Ezell wrote David McMain, a supervisor in the Jackson office of USF&G and advised:

> After obtaining legal opinions from our attorneys we feel that we will have to file some type of answer on this suit and even though Gary L.

> Brock . . . carried insurance on his vehicle . . . , and even though our policy insures specifically prescribed [sic] vehicles, it is alleged in the suit that the driver, Gary Brock was on business for the insured at the time this loss occurred. . . . I believe you have a copy of the suspense and also copies of the police report. The police report lists the owner of the vehicle as Steve Knight Steel Fabricators. Ex.P.-23.

Two days later, Ezell placed a memo in his file that Morse had informed him that USF&G owed Knight a defense. T.289. Ezell also testified that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN 154-B endorsement to the BAP. App.104, R.1139.

On August 18, 1988, Ezell wrote Morse that the BAP did not cover the accident because Brock's truck was not a "specifically described vehicle." App.90, 91, R.135-137, Ex.D1-22, T.287. At that time, Ezell did not have the statement of Brock requested in his August 15 letter to McMain. During its investigation, USF&G took no statements from Knight, Brock or from Glenda Hunnicutt. T.52, 53, 69. Morse, while he met with Knight, never discussed with him the employment status of Brock at the time of the accident. T.117. No one from USF&G took Young's statement. *Id.* When Ezell instructed Morse to deny coverage, all the information he had was the accident report, the BAP, and endorsement JXN 154-B (T.302-303). Ezell's letter does not mention the endorsement. Ezell never obtained an opinion regarding coverage for Brock's vehicle under the non-owned vehicle endorsement, JXN 154-B, from either USF&G's Jackson office or from Morse. T.269, 298-299.

On August 19, 1988, Morse received a copy of the transcribed testimony of Brock and Knight from the manslaughter trial. (T.318) At the trial, both Knight and Brock testified that Brock had gone to Slidell with Knight's permission, and was specifically instructed by Knight to return to the Pearlington yard to meet and tie up some arriving barges. T.338-339.

On August 22, 1988, Morse received the letter from Darwin Ezell advising him to withdraw because Brock's pickup was not "specifically described" in the policy, and, therefore, there was no duty to defend. Ex.D1-22, R.135-137.

Morse testified that when coverage was denied, Morse had in his possession the policy and endorsement, the complaint, and the knowledge that Brock was driving a non-owned vehicle. T.349-350.

On September 21, 1988, Morse filed his Motion to Withdraw. App.86, T.258, R.132. Prior to his withdrawal, Morse conducted no discovery in the case. Morse's affidavit in support of the Motion and Ezell's letter of August 18, 1988, which were attached as exhibits to the Motion, stated the basis for withdrawal was that Brock's vehicle was not a "scheduled vehicle." App.88, 90.

The attorney for the Estate wrote to Morse and advised him that Knight had said that there was additional coverage or policies. On November 11, 1988 Morse wrote to Ezell about the possibility of additional coverage and suggested that a search be made for other policies " . . . To be absolutely sure that we are not at risk for a bad faith claim. . . . " App.92, Ex.D-1-30, T.325.

Knight, who had less than a high school education, did not understand that he had non-owned vehicle coverage under the USF&G Policies. He had further lost possession of his copies of the policies themselves as a result of a bankruptcy action. App.96, 98, R.867).

On December 5, 1988, Plaintiff moved to Amend the Complaint to name Steve Knight individually, and to allege, in addition to course and scope of employment, negligent entrustment. R.152. R.196. Morse responded to the Motion to amend on December 5, 1988 by stating he had moved to withdraw and could not respond. App.94 Leave to amend was granted on December 8, 1988. On December 27, 1988, the Amended Complaint was filed. R.228.

USF&G, while it had notice of the Amendment, never filed another answer on behalf of Knight. The court on January 23, 1989, entered an order allowing Morse to withdraw. R.243. On April 20, 1989, Morse wrote to Joe Montgomery, an attorney who Knight consulted, concerning USF&G's refusal to provide a defense. Morse's letter stated he was withdrawing the defense on behalf of USF&G because the vehicle was not a specifically described vehicle and, therefore, not covered. App.101, Ex.D-2, 16. Morse's letter made no mention of the BAP policy or the issue of coverage under the non-owned vehicle endorsement, JXN 154B, even thought USF&G's interoffice communications and Morse's correspondence demonstrate they were in possession of the non-owned vehicle endorsement.

8. Course of Litigation after Withdrawal

On January 25, 1989, Knight was served with the amended complaint. R.251. On March 30, 1989, Plaintiff moved to Strike the original answer, and also filed its Motion for Default Judgment. R.290. On May 25, 1990, the Trial Court granted the Motion of Plaintiff for entry of default, and referred the matter to the U.S. Magistrate for a hearing to determine damages. R.446. After a full hearing before the magistrate (R.448-448A, 449-451), the trial court entered a Default Judgment against Defendants Knight for the sum of $1,173,591.00, on June 18, 1990. R.452. The Report and Recommendation of the Magistrate found as a matter of fact that Brock was acting within the course and scope of his employment at the time and place of the accident, and that Knight was responsible for the damages to the Plaintiff. R.450.[2]

9. Garnishment Action

On September 26, 1990, the Buice Estate filed a Suggestion for Writ of Garnishment naming USF&G and Chicago as Garnishees. R.454. USF&G filed its Answer and Motion to Dismiss on October 16, 1990. R.455. The Motion to Dismiss was denied.

On November 19, 1991, the Buice Estate moved for Partial Summary Judgment on the basis that USF&G, in its answer on behalf of Steve Knight, Jr., Steel Fabricators,

---

[2] USF&G's only challenge to the Default Judgment was to unsuccessfully attack diversity jurisdiction. Otherwise, Defendants have never challenged the procedural or substantive validity of the Default Judgment.

Inc., admitted that Brock was negligent but denied that Brock was in the course and scope of his employment; and that the Magistrate determined and the District Judge found that Brock *was* acting in the course and scope of his employment. R.656-659. The Buice Estate asserted that the "scope of employment" allegation triggered a duty to defend, and that when USF&G refused to provide a defense, it was bound by the judgment against Knight because it *could* have defended him. For the first time, in defending this Motion, USF&G claimed that there was a fact issue as to coverage under the non-owned vehicle endorsement, JXN 154-B, based on whether Brock was "solely" on his employer's business at the time of the accident. R.668-673.

On December 24, 1991, a motion was made to consolidate *Buice v. Knight, et al.*, S87-0517(G) with *Knight v. USF&G, et al.*, S91-0352(P). R.681. This was granted on January 15, 1992. R.723.

On March 10, 1992, the Trial Court denied the Buice Estate's Motion for Partial Summary Judgment in a Memorandum Opinion, which was formalized in an Order of March 24, 1992. R.166, 167, 725, 748. The Court determined that Summary Judgment was not appropriate because "it is unclear . . . whether the vehicle was used solely for business purposes as outlined" in JXN 154-B. R.729. The Court did not alter its previous adjudication that Brock was acting in the course and scope of his employment. *Id.*

The Buice Estate on March 30, 1992, Moved for Reconsideration, or alternatively, for an interlocutory appeal under 28 USC § 1292(b).

The Court denied the Motion to Reconsider or for Interlocutory Appeal on September 25, 1992 (R.945, 952) finding that there were insufficient facts on which to determine that USF&G had breached a duty to defend Knight. R.948. The request for an interlocutory appeal was likewise denied.

On November 16, 1992, the Buice Estate resubmitted its Motion for Partial Summary Judgment. R.1109. The basis of the resubmitted Motion was the deposition of Stanford Morse, wherein he stated that the only coverage issue in the underlying case against Knight was whether "Brock was acting in the course and scope of his employment" R.1135, and the testimony of Darwin Ezell that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN 154-B endorsement to the BAP. App.104, R.1139. Ezell had testified that the only reason why he believed that coverage was non-existent was because Brock was intoxicated, and the accident occurred late at night. R.1143. The Buice Estate in the renewed motion asserted that these statements, coupled with the fact that there was no reservation of rights and non-waiver agreement between Knight and USF&G, were sufficient to establish a duty to defend on the part of USF&G, and to prove that USF&G had breached that duty.

On December 4, 1992, the Buice garnishment action was severed from the Knight tortious breach of contract action. R.626, 1183. The garnishment action proceeded to trial before the district court without a jury on December 14, 1992. R.829.

On April 20, 1994, the district court entered its Bench Opinion in the garnishment action releasing USF&G from the writ of garnishment. App.49, R.829-851. That matter is pending argument on appeal before the Fifth Circuit.

10. The Course of this Action in the Courts Below.

This action began August 1, 1991, when plaintiff/petitioner Knight sued defendant/respondent, USF&G, for tortious breach of insurance contracts. R.1-6. On September 11, 1991, USF&G answered alleging it had an arguable reason for denying coverage. R.60-65. On October 16, 1992, USF&G filed its motion for summary judgment. R.416. On November 16, 1994, the district court entered its memorandum opinion sustaining USF&G's motion for summary judgment in Knight's action No. 91-0352(G). App.10, R.866-889. On November 29, 1994, the district court entered judgment dismissing Knight's cause of action against USF&G with prejudice. R.890-891.

On petitioner's appeal, the Fifth Circuit on September 21, 1995, entered its judgment and opinion affirming the Southern District of Mississippi judgment. App.1. A petition for rehearing was filed and the Fifth Circuit entered an order denying the petition on November 2, 1995. App.38, 39.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT, THE DECISIONS OF THE COURT BELOW AND THE DECISIONS OF OTHER COURTS OF APPEAL UNDER RULE 56 F.R.C.P., WHERE THERE ARE MATERIAL FACTS SUPPORTING CONFLICTING REASONABLE INFERENCES OF THE "GOOD FAITH" OF A LIABILITY CARRIER IN ITS WITHDRAWAL FROM A DEFENSE OF ITS INSURED.

The trial court granted summary judgment under Rule 56 F.R.C.P. to USF&G on Knight's claim that its actions in withdrawing from the defense of the wrongful death suit filed by the Buice Estate constituted bad faith. The court below in its ruling held that:

> The district court found that at the time that USF&G attorney Morse filed his motion to withdraw as counsel for Knight there was no indication that the truck driven by Brock was covered under any of the USF&G policies. We agree. When Knight sold the truck to Brock, he notified USF&G, through Crystal, that he no longer owned the truck. USF&G's investigation also revealed no indication that Brock was acting within the course and scope of his employment. At the time of the accident, Brock was out driving at approximately midnight while under the influence of alcohol. *Therefore, it was reasonable for USF&G to conclude that Brock was not operating the truck solely for the business purposes of Knight as required for coverage under the non-owned vehicle endorsement of the business auto policy.* 65 F.3d at p. 37. Emphasis supplied.

The emphasized portion of the decision below demonstrates that the district court and the court below have failed to apply Rule 56 F.R.C.P. as its application is mandated in the decisions of this Court, previous decisions of the Fifth Circuit Court of Appeals and the decisions of the other United States Courts of Appeals.

Rule 56(c) provides the standard for granting summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

A "material fact" is one that might affect the outcome of the suit under the governing law. As this Court has said:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) at 248.

A fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson, supra* at 248.

This Court further noted that the

> standard for application of Rule 56 mirrors the standard for a directed verdict under Rule 50(a) F.R.C.P., which is that the trial judge must direct a verdict if, under the governing law, there can

> be but one reasonable conclusion as to the verdict. . . . If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Id. at p. 250, 251.

The trial judge's function is to determine whether there is a genuine issue for trial. The judge is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. *Id.* at 250, *Honore v. Douglas*, 833 F.2d 565 (C.A. 5th 1987); *Leonard v. Dixie Well Service and Supply Co.*, 828 F.2d 291 (C.A. 5th 1987).

In viewing the evidence on a summary judgment motion, the evidence for the nonmovant is to be believed by the trial court, and all justifiable inferences are to be drawn in his favor. *Anderson, supra*, at 255. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), at 1356, 57, *Meyers v. M/V Eugenio C*, 842 F.2d 815 (C.A. 5th 1988) All factual uncertainties are resolved and all reasonable inferences are drawn in favor of the nonmovant. *Meyers, supra*, 842 F.2d at 816; *Honore, supra*, 833 F.2d at 567, 68.

Summary judgment dismissal is particularly inappropriate for resolving state-of-mind issues, *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); questions of motivation and intent, *Honore, supra*, 833 F.2d at 569, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (C.A. 5th 1985); ambiguous contracts where parties' intent presents a question of fact, *Fishbach and Moore, Inc. v. Cajun Electric Power Cooperative, Inc.*, 799

F.2d 194 (C.A. 5th 1986); *First National Bank of Jackson v. Pursue Energy Corp.*, 799 F.2d 149 (C.A. 5th 1986); *Southern Natural Gas v. Pursue Energy*, 781 F.2d 1079 (C.A. 5th 1986); *Corwin v. Marney, Orton Investments*, 843 F.2d 194 (C.A. 5th 1988).

The decision of the trial court and the court below conflicts with the precedents of this Court, and other federal courts of appeal including the court below. Both courts concluded that:

> it was *reasonable* for USF&G to conclude that Brock was not operating the truck solely for the business purposes of Knight as required for coverage under the non-owned Vehicle endorsement of the business auto policy. 65 F.3d at 37. Emphasis supplied.

This was not the only *reasonable* conclusion to be drawn from the facts at USF&G's disposal concerning the employment status of Brock at the time of the accident. Existence of an arguable reason for coverage denial will not shield an insurer from punitive damages where there are countervailing acts of bad faith. The objective evidence of bad faith and the applicable Mississippi substantive law are discussed under the second heading of "Reasons for Granting the Writ", infra.

There was a disputed issue of material fact which had to be resolved against USF&G under the test pronounced by this Court and the various circuit courts.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE MISSISSIPPI SUPREME COURT DEFINING THE FACTUAL CIRCUMSTANCES UNDER WHICH A LIABILITY CARRIER BREACHES ITS DUTY TO DEFEND ITS INSURED.

a. The allegations of the Complaint compelled a defense of Knight by USF&G.

In Mississippi, a liability insurer's duty to defend its insured is determined from the allegations of the complaint against the insured:

> the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint in such action. *Southern Farm Bur. Cas. Ins. Co. v. Logan,* 238 Miss. 580, 119 So. 2d 268, 271 (1960)

See also: *Audubon Ins. v. Terry Road Wine & Liquor,* 875 F.Supp. 1243 (S.D.Miss. 1995); *Employers Reinsurance v. Martin, Gordon & Jones,* 767 F.Supp. 1355 (S.D.Miss. 1991). In interpreting policy language to determine a duty to defend, courts resolve any doubts and ambiguities in the insured's favor. *State Farm Mutual Auto Ins. Co. v. Taylor,* 233 So. 2d 805 (Miss. 1970); *Rhodes v. Chicago Ins. Co.,* 719 F.2d 116 (C.A. 5th 1983).

If the "four corners" of the complaint give rise to a duty to defend, knowledge gained by the insurer from outside the allegations of the complaint which demonstrate the claim is not covered is irrelevant. *Southern Farm Bureau Cas. Ins. Co. v. Logan, supra,* B. Ostrager and T. Newman, *Handbook on Insurance Coverage Disputes,* Sec.

5.02(a)(2)(A). On the other hand, knowledge gained by the carrier outside of the four corners of the complaint which demonstrates coverage, is relevant. *Id.*

Even assuming that Mississippi law went beyond the "four corners" of the complaint to determine a duty to provide a defense, there was a clear basis for invoking the duty in the information which USF&G had in its possession at the time Morse was directed to withdraw from the defense of Knight. At that time USF&G had the Buice Complaint, the accident report, and the transcript of the testimony taken in the Brock manslaughter trial. R.840. It also had Morse's instructions indicating that Knight should be defended. T.289. The Complaint indicated that Brock was in the course and scope of his employment. R.867. This was sufficient to trigger the duty to defend under the non-owned vehicle endorsement of the BAP policy. *Southern Farm Bureau v. Logan, supra.* The accident report showed the vehicle driven by Brock bore a "Steve Knight Steel Fabricating" sign or placard painted on its front doors. R.840. The manslaughter transcript showed that, at the time of the collision, Brock was returning to the job site to tie up barges pursuant to the specific instruction of his employer, Knight. R.833-834, 851-852, T.318. USF&G's adjuster, Darwin Ezell, testified that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN 154-B endorsement to the BAP. App.104, R.1139. There was clear evidence in USF&G's possession that Brock was acting "solely" in connection with Knight's business at the time of the collision.

b. The unqualified defense by USF&G prejudiced Knight.

When the Buice Estate filed its suit against Knight, it claimed that Knight's employee, while in the course and scope of his employment, struck and killed Mary Virginia Buice. Knight was, therefore, liable. USF&G answered on Knight's behalf, admitting negligence of Brock, the employee, but denying that he was acting in the course and scope of employment. R.349-354, 673, 797, 841, 868. USF&G defended Knight without a reservation of rights and without obtaining a non-waiver agreement from Knight. USF&G filed no Declaratory Action seeking a determination of its rights and its liability under the policy. Morse filed his Motion to Withdraw his defense of Knight, after having filed an Answer to the Complaint, prejudicing Knight by admitting the negligence of his employee, Brock.

Where the withdrawal of a defense will prejudice the insured, then the duty to defend is a continuing duty. *Southern Farm Bureau v. Logan, supra,* holds:

> [T]he fact that the insurer assumes the defense may give rise to a duty to *continue* with the defense and make the insurer liable for its withdrawal therefrom, though it would not have been liable if it had not assumed the defense in the first instance. And the general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured.
> 875 F.Supp. at 1248.

See also: *Employers Reinsurance, supra,* and *Audubon Ins. v. Terry Road Wine & Liquor, supra.* In *USF&G v. Yost,* 183 So. 260 (Miss. 1938), the court noted that where the insurer has exclusive control of the defense of its insured and conducts an inadequate investigation of the facts of the case, and subsequently withdraws, it waives any right of withdrawal of the defense of the case based upon what it could have learned if it had properly investigated. Assumption of the defense and withdrawal without adequate investigation by the carrier constitute prejudice to the insured. *Stonewall Ins. Co. v. Cooke,* 165 Miss. 619, 144 So. 217 (1932).

Mississippi is in accord with the general rule that where the insurer controls the defense of the litigation, and where it defends with knowledge of all of the facts, without a reservation of rights or a non-waiver agreement, withdrawal of the defense constitutes prejudice to the insured. *Fidelity & Cas. Co. of New York v. Riley,* 380 F.2d 153 (C.A. 5th 1967). In such a situation, the insurer is estopped to assert any policy provision which would otherwise defeat coverage or the obligation to defend. *Nat. Mut. Ins. Co. v. McMahon & Sons,* 356 S.E.2d 488 (W.Va.1987); *Burnham Shoes, Inc. v. West American Ins. Co.,* 504 So. 2d 238 (Ala. 1987).

USF&G entered upon the defense of Knight. It filed an answer admitting negligence on the part of Knight's employee, Brock. R.349-54. It invoked Knight's cooperation. Obviously, USF&G determined at that point in time that there was a duty to defend. It brashly chose to do so without a reservation of rights letter or a non-waiver agreement.

c. USF&G failed in its duty to conduct an adequate investigation.

USF&G having unqualifiedly entered upon the defense of Knight, the issue becomes: Under what circumstances could USF&G reasonably withdraw from the defense of its insured? Central to this case is the issue of the reasonableness of the investigation conducted by USF&G prior to its abandonment of Knight's defense. Ezell's letter to Morse instructing him to withdraw is predicated solely on the fact that Brock's vehicle was not a scheduled vehicle under any of the policies. Ex.D-1-22, T.287, R.135-137. Before abandoning the defense of Knight, USF&G owed him a duty of a reasonably diligent investigation to determine whether Brock's vehicle was, pursuant to the non-owned vehicle endorsement, "being used solely in connection with your (Knight's) business." [I.e., in the course and scope of employment.] Had such an investigation been made, it would have revealed a clear fact issue of whether such was the case. This fact issue, as a matter of law, had to be resolved in favor of providing a defense for Knight. *Mavar Shrimp & Oyster Co. v. USF&G*, 187 So. 2d 871 at 874 (Miss. 1966). *Mavar* demonstrates that where the complaint does not show coverage, but the carrier knows from the insured that the true facts are different from the complaint, and that there is *potential* liability, a defense is owed. *Id.* at 875. Under Mississippi law, the interpretation of the policy giving greater protection to the insured should prevail. *State Farm Mut. Auto. Ins. Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970).

When USF&G referred the defense of Knight to attorney Stanford Morse, it also referred to him the question of coverage under Knight's various policies. When USF&G withdrew its defense, it advised Knight that there was no coverage because, when the accident occurred, Brock was not driving a vehicle which was listed as a covered vehicle on the BAP policy declarations page. R.134-37. Despite the fact that the proof showed that they had a copy of the BAP policy and the non-owned vehicle endorsement, Morse and USF&G either failed to consider or ignored coverage under the non-owned vehicle endorsement JXN 154-B when they withdrew from the defense of Knight. R.840. USF&G produced no document which showed that Morse or USF&G ever made an investigation to resolve the conflicting evidence whether Brock was acting in the course and scope of his employment at the time of the collision.

USF&G did not even raise the issue of whether Brock was acting "solely" on the business of Knight at the time of the accident until it responded to the Buice Estate's second Motion for Partial Summary Judgment. The issue of credibility of USF&G's agent's and attorney's claim that they adequately investigated and acted in good faith with respect to the non-owned vehicle coverage was a genuine issue of material fact before the trial court. *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (C.A. 7th 1978); *Fortress Re, Inc. v. Central National Insurance Co. of Omaha*, 766 F.2d 163 (C.A. 4th, 1985); *Overstreet v. Kentucky Central Life Ins. Co.*, 950 F.2d 931 (C.A. 4th 1991).

d. USF&G did not raise an "arguable reason" under the non-owned vehicle endorsement until it responded to Buice's second motion for summary judgment.

It is important to note that the "arguable reason" to deny Knight a defense based on the word "solely" in the non-owned vehicle endorsement was asserted only after the Buice Estate filed its second Motion for Summary Judgment. In *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1986), the defendant denied coverage on the basis of one reason up until trial, and then changed its position. The Mississippi Supreme Court noted that, in order to answer the question of whether Bankers Life had a legitimate or arguable reason to deny the claim requires:

> . . . an evaluation of the conduct of Bankers Life in handling this claim, as well as the reason it gave for denying the claim *prior to actual trial*, and the reason given during trial.

483 So. 2d at 269. In affirming an award of punitive damages for "bad faith" the Mississippi Supreme Court catalogued that: the defendant ignored its own investigative directives; it obtained no interview of the insured and his doctors; it did not obtain the medical records; it denied the claim based upon an invalid exclusion. *Id.* at 270. Not until trial did Bankers Life assert that the claim was denied for a legitimate reason. Again, the Court stated:

> Furthermore, the issue is not the defense which Bankers Life at trial finally settled upon to defend the suit, but the reason it gave

Crenshaw for denying the claim. See: *Aetna Life & Cas. Co. v. Lavoie*, 470 So. 2d 1060 (Ala.1985). *Id.* at 273.

The facts of this case are closely analogous to the *Crenshaw* facts. USF&G's adjuster, Darwin Ezell, testified that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN 154-B endorsement to the BAP. App.104, R.1139. USF&G dropped its defense because, at the time of the accident, Brock was not using one of Knight's scheduled vehicles. It subsequently defended its decision to withdraw the defense on the basis of its interpretation of the non-owned vehicle endorsement. Bankers Life denied the Crenshaw claim for one reason and defended on another. USF&G acted without investigating pursuant to its own criteria. Bankers Life denied the claim on a likewise insufficient investigation. USF&G's legal decision was based upon the opinion of an attorney with an obvious conflict of interest. Bankers Life relied solely on the opinion of its in-house physician, who was only quite willing to ignore the gaps in the investigation and base his opinion on facts favorable only to Bankers Life. In essence, the Court said, Bankers Life "quit when they were ahead." *Id.* at 273, fn. 6. USF&G did the same. See also: *Henderson v. USF&G*, 620 F.2d 530 (C.A. 5th 1980); *Reserve Life Ins. Co. v. McGee*, 444 So. 2d 803 (Miss. 1984).

e. USF&G's attorney and claims adjusters had a conflict of interest in defending Knight while evaluating a coverage defense for USF&G.

Also relevant is the conflict of interest of the individuals making the decision to withdraw from the defense of Knight. Morse, was employed by USF&G to represent Knight. Morse entered upon the defense of Knight without a reservation of rights or non-waiver agreement. Morse also participated in USF&G's decision to withdraw from the defense of Knight. It is basic that Morse had a conflict of interest in representing Knight on one hand and on the other hand advising USF&G on the coverage issue at the very same time. This in itself is a violation of Mississippi law, creating a fact issue regarding whether USF&G acted in bad faith in refusing to continue to defend Knight. See *Hartford Acc. & Ind. Co. v. Foster*, 528 So. 2d 255 at 263 (Miss. 1988). Other jurisdictions hold that a similar conflict of interest will estop an insurer from asserting a denial of coverage. *Transamerica Ins. Group v. Chubb & Son, Inc.*, 554 P.2d 1080 (Wash. App. 1976). There the court stated:

> As a matter of law and in the absence of extraordinary circumstances, 10 months is too long a period for counsel for [the insurer] to occupy the dual role.
>
> The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken. By its own actions, [the insurer] irrevocably fixed the course of events concerning the law suit for the first 10 months. *Of necessity, this establishes prejudice.* 554 P.2d 1083. Emphasis supplied.

The same is true here. Not only did Morse enter on the defense of Knight while preparing to defend a bad faith suit which he foresaw from Knight, but Morse took no action to protect Knight from the consequences of Morse's admission of his employee's negligence.

f. Summary of the evidence of USF&G's bad faith.

The allegations of the complaint compelled a defense under Mississippi law. USF&G's adjuster, Darwin Ezell, testified that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN 154-B endorsement to the BAP. App.104. USF&G invoked the insured's cooperation under the policy. It defended Knight with no reservation of its rights or non-waiver letter. It prejudiced Knight by admitting Brock's negligence. USF&G and Knight, before USF&G's withdrawal, had a common interest in successfully litigating the issue of Brock's employment status at the time of the accident. It withdrew its defense of Knight without examining the non-owned vehicle endorsement or advising Knight of its terms and exposed him to a judgment in excess of one million dollars. All of USF&G's and its attorney's actions were taken at a time when the attorney ostensibly hired to defend Knight was searching for reasons for USF&G to be able to abandon its defense of the insured. USF&G belatedly raised the terminology of the non-owned coverage endorsement after it withdrew from the defense of Knight. The facts all support the reasonable inference under Mississippi law that USF&G acted in bad faith in withdrawing from the defense of Knight.

Both the trial court and the court below refused to apply substantive Mississippi law in ruling on the respondent's motion for summary judgment. This action contradicts the clear dictates of this Court in the landmark case of *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *Erie* requires the federal courts to apply state substantive law in determining any issue or claim which has its source in state law.

The courts below have condoned USF&G's flagrant violation of its duties to its insured and establish precedent which effectually emasculates Mississippi law on the duty of an insurer to defend its insured. In the face of such judicial legislating, and broad and extensive departures from established precedent of this Court, this Court is warranted in exercising discretion to hear this case for the purpose of performing an error-correcting function in its role as supervisor of federal litigation.

CONCLUSION

The trial court and the court below failed to apply the proper test in considering summary judgment motions as pronounced by this Court, other Federal circuit courts and other decisions of the court below. The issue of the good faith of the respondent in denying a defense to its insured under the conflicting objective evidence, was not a proper issue for disposition by summary judgment, but a jury issue. The radical refusal by the court below to apply Mississippi substantive law calls for this Court's exercise of its supervisory powers to correct this departure from established federal procedure.

Respectfully Submitted,

BRAGG E. WILLIAMS, III
Counsel of Record
Attorney at Law
P. O. Box 113
Poplarville, MS 39470-0113
(601) 795-4572
Counsel for Steve Knight

January 30, 1996

Steve KNIGHT, Jr., d/b/a Steve Knight Steel Fabricators and Steve Mark Knight, as the Administrator of the Estate of Willie Steve Knight, Jr., Plaintiffs,

Steve Knight, Jr., d/b/a Steve Knight Steel Fabricators, Plaintiff-Appellant,

v.

UNITED STATES FIDELITY & GUARANTY INS. CO. and Chicago Insurance Co., Defendants,

United States Fidelity & Guaranty Ins. Co., Defendant-Appellee.

No. 94-60861
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 21, 1995.

Insured's employee brought action against insurer to recover for breach of contract and bad faith arising out of insurer's decision to discontinue defense of employee in wrongful death suit. The United States District Court for the Southern District of Mississippi, Walter J. Gex, III, J., entered summary judgment in favor of insurer. Administrator of employee's estate appealed. The Court of Appeals, Benavides, Circuit Judge, held that duty to defend employee under business automobile insurance policy ended when insurer reasonably concluded that employee was not operating his truck solely for business purposes of insured.

Affirmed.

William L. Denton, Biloxi, MS, Joseph H. Montgomery, Williams, Williams & Montgomery, Poplarville, MS, for appellant.

Raymond L. Brown, A. Kelly Sessoms, Brown & Watt, Pascagoula, MS, for appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before KING, SMITH and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Plaintiff-Appellant Steve Mark Knight ("Knight") appeals an adverse summary judgment granted in favor of Defendant-Appellee United States Fidelity & Guaranty Insurance Company's ("USF & G"). The district court found that USF & G's act of withdrawing its defense for Knight in a wrongful death action was reasonable because there was no indication, from the information uncovered by USF & G in its investigation, that the vehicle driven by Knight's employee was covered under USF & G's insurance policies, or that Knight's employees was acting in the course of his employment at the time of the accident. Therefore, the court concluded that there was no basis for the imposition of punitive or extracontractual damages against USF & G. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

Steve Knight, Jr. ("Knight, Jr."), owner of Steve Knight Steel Fabricators, Inc. ("Knight Steel"), operated a

barge steel fabrication plant at Port Bienville in Pearlington, Mississippi and a gravel pit in Nicholson, Mississippi. Knight, Jr.'s insurance agent, Burt Young ("Young") of Crystal Springs Insurance Agency ("Crystal"), an authorized USF & G agency, issued Knight three insurance policies for his business; a business auto policy, a trucker's policy, and a general liability policy. The policies covered all of the vehicles Knight, Jr. used in his business.

Gary Brock ("Brock"), an employee of Knight, Jr., was required, on occasion, to be available around-the-clock seven days a week. During these periods, Brock lived at the steel fabrication plant in a rent-free mobile home. On June 1, 1984, Brock purchased one of Knight, Jr.'s company pick-up trucks. Knight, Jr. assisted Brock in obtaining financing for the truck through a Louisiana bank, and assisted Brock in obtaining insurance coverage with Young at Crystal. At that time, Knight, Jr.'s bookkeeper notified Crystal that the truck was no longer Knight, Jr.'s property.

On July 6, 1984, Brock had been working at the gravel pit. He then drove to Slidell, Louisiana to visit a friend. As he was driving back to the steel fabrication plant in the truck he purchased from Knight, Jr., Brock collided with another vehicle driven by Mary Virginia Buice ("Buice") and fatally injured her. Brock was intoxicated at the time of the accident.

On August 17, 1987, Buice's estate filed a wrongful death suit against Knight Steel and Time Saver Stores, Inc. alleging that Knight, Jr. was liable because Brock was acting within the scope of his employment at the time of

the accident.[1] Stanford Morse, Jr. ("Morse"), who was retained by USF & G as counsel for Knight Steel in August 1988, filed an answer On August 12, 1988 admitting Brock's negligence, but denying that he was acting within the scope of his employment at the time of the accident.

In the course of its investigation, USF & G determined that none of the three insurance policies provided coverage for the accident. Darwin Ezell, a claims adjuster at USF & G, informed Morse that there was no coverage under the policies, and advised Morse that USF & G did not owe Knight Steel a duty to defend. Morse subsequently met with Knight, Jr., informed him that there was no coverage under the policies and told Knight, Jr. that he would have to retain his own attorney. Morse also sent a letter to Knight, Jr. dated September 21, 1988, stating that USF & G "does not insure the above-referenced claim," and informing him that a motion to withdraw as counsel for Knight Steel would be filed. On September 22, 1988, Morse filed his motion to withdraw. Knight, Jr. did not file an objection to the motion. Morse was allowed to withdraw as attorney of record for Knight Steel on January 23, 1989.

After Morse withdrew, Knight, Jr. consulted with attorney Joseph H. Montgomery ("Montgomery") about the wrongful death suit. On February 8, 1989, Montgomery wrote a demand letter to USF & G, and sent copies of the letter to Crystal and counsel for the Buice estate.

---

[1] An amended complaint, filed December 27, 1988, added Knight, Jr. individually d/b/a Knight Steel as a defendant.

Morse responded by indicating that the policies did not cover the Buice estate claims.

On March 28, 1989, the Buice estate filed a motion to strike Knight Jr.'s answer and for entry of default judgment against Knight, Jr. On June 18, 1990, the district court entered default judgment for $1,173,591.00. The Buice estate then instituted a garnishment action against USF & G.

On August 1, 1991, Knight, Jr. filed suit against USF & G seeking punitive damages for tortious breach of contract and bad faith. Knight, Jr. subsequently died, and Steve Mark Knight, Administrator of the Estate of Willie Steve Knight, Jr.[2], was substituted as the party plaintiff in place of Steve Knight, Jr. d/b/a Steve Knight Steel Fabricators on May 12, 1994. Knight's suit was consolidated with the Buice estate's wrongful death and garnishment action, but was severed just before trial began on the garnishment action. The garnishment action proceeded to trial without a jury on December 14, 1992.

On April 20, 1994, the district court entered its bench opinion releasing USF & G from the writ of garnishment. The court concluded that no coverage existed under any of the USF & G policies; specifically finding that at the time of the accident Brock was not using the pick-up truck solely for business purposes as required under the provisions of the applicable business auto policy to trigger coverage.[3]

---

[2] Willie Steve Knight, Jr. and Steve Knight, Jr. are one and the same.

[3] A separate appeal on the garnishment action is now pending before this Court.

USF & G filed a motion for summary judgment in Knight's bad faith action claiming that the bench opinion in the garnishment action disposed of all claims in the bad faith action because with no coverage there is no duty to defend, and that as a matter of law the bench opinion established that USF & G had an arguable or legitimate reason not to defend Knight in the underlying action. On November 16, 1994, the district court granted USF & G's summary judgment motion, and subsequently entered final judgment dismissing Knight's bad faith action. Knight now appeals the summary judgment order and final judgment of the district court.

STANDARD OF REVIEW

We review the district court's summary judgment *de novo. Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 (5th Cir.1993). Summary judgment is appropriate when there exists no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *See* FED.R.CIV.P. 56(c). "The construction and effect of an insurance policy are questions of law reviewable *de novo.*" *E.E.O.C. v. Southern Pub. Co., Inc.*, 894 F.2d 785, 789 (5th Cir.1990) (citing *Diversified Group, Inc. v. Van Tassel*, 806 F.2d 1275, 1277 (5th Cir.1987)).

DUTY TO DEFEND

Part IV of the business auto policy issued to Knight by USF & G and in effect at the time of the accident at issue in this case provides in pertinent part:

A. WE WILL PAY

1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy. We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle.

The business auto policy also contains a non-owned vehicle endorsement, which states as follows:

> It is agreed that the unqualified word "insured" wherever used in Part IV – Liability Insurance includes only you and any organization legally responsible for the use of the automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used solely for business purposes in connection with your business.

Knight contends that USF & G became contractually obligated to defend him, pursuant to his insurance policies, as soon as he was served with the Buice estate's complaint alleging wrongful death caused by the negligence of Knight's employee, Brock. He argues that USF &

G's contractual obligation to defend the action remained in effect despite the fact that USF & G's investigation revealed that the vehicle involved in the accident was no longer covered under any of the insurance policies because the language non-owned vehicle endorsement arguably still covered Brock's actions at the time of the accident. Specifically, Knight asserts that the use of the word "solely" in the non-owned vehicle endorsement does not intend to prevent coverage where a mission combines elements of both business and personal affairs of the employee if the accident occurs at a time when the employee is acting in the course and scope of the business of his employer.

Under Mississippi law, the determination of an insurer's duty to defend an action is accomplished by measuring the allegations in the plaintiff's pleadings without regarding the ultimate outcome of the action. *Southern Pub. Co. Inc.*, 894 F.2d at 789. The Buice estate complaint alleges that Brock, an employee of Knight, was in the course and scope of his employment when he negligently, carelessly and recklessly drove a truck across the center line of the highway and struck Buice's vehicle, causing her death. The district court found that at the time that USF & G attorney Morse filed his motion to withdraw as counsel for Knight there was no indication that the truck driven by Brock was covered under any of the USF & G policies. We agree. When Knight sold the truck to Brock, he notified USF & G, through Crystal, that he no longer owned the truck. USF & G's investigation also revealed no indication that Brock was acting within the course and scope of his employment. At the time of the accident, Brock was out driving at approximately

midnight while under the influence of alcohol. Therefore, it was reasonable for USF & G to conclude that Brock was not operating the truck solely for the business purposes of Knight as required for coverage under the non-owned vehicle endorsement of the business auto policy.

Having concluded that USF & G did not have a duty to defend Knight in the Buice estate action, we further find no basis for the imposition of punitive or extra-contractual damages against USF & G. *See Hans Constr. Co. v Phoenix Assurance Co. of New York,* 995 F.2d 53, 55 (5th Cir.1993) (punitive damages unavailable if insurer has a legitimate or arguable reason for denying coverage) (citing *Universal Life Ins. Co. v. Veasley,* 610 So.2d 290, 293 (Miss.1992)).

CONCLUSION

For the reasons articulated above, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STEVE KNIGHT, JR. d/b/a
STEVE KNIGHT STEEL FABRICATORS PLAINTIFF

VS. CIVIL ACTION NO. 1:91cv352GR

UNITED STATES FIDELITY
AND GUARANTY and CHICAGO
INSURANCE COMPANY DEFENDANTS

MEMORANDUM OPINION

(Filed Nov. 16, 1994)

This cause comes before the Court on motion of the defendants, United States Fidelity and Guaranty [USF&G] and Chicago Insurance Company [Chicago], for partial summary judgment on plaintiff's claims for extra-contractual and punitive damages and plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Also before the Court is defendant USF&G's motion to strike plaintiff's resubmitted motion for partial summary judgment. After due consideration of the briefs of counsel, the evidence of record, the applicable law, and being otherwise fully advised in the premises, this Court makes the following findings.

Statement of Facts

I. The Lawsuit

The case originated as a wrongful death action, resulting from an automobile accident which occurred

July 6, 1984, when a vehicle driven by Gary Brock, an employee of Steve Knight, Jr., struck the vehicle driven by Mary Virginia Buice, fatally injuring her. The Buice estate filed a complaint[1] against Steve Knight Steel Fabricators, Inc. [SKSF], and Time Saver Stores, Inc., on August 17, 1987, alleging that Knight was liable for the actions of Brock and that Brock was acting in the course and scope of his employment at the time of the accident.

The complaint also alleged that Brock was intoxicated or under the influence of alcohol at the time of the accident and that Brock's negligence was the cause of Mary Virginia Buice's death. Two summons were issued to SKSF; one in August 1987, which was served on the Secretary of State, and an alias summons, which was issued and returned in December 1987.

Knight appeared at an April 1988 deposition unrepresented by counsel in connection with the wrongful death action and stated at that time that his business records were lost after his business was foreclosed. (Chicago's Summ. J. Mot., Exh. 6, pp. 14-16.) Knight stated at the deposition that his only insurance policy was the USF&G policy. *Id.*

The Buice estate was allowed to file an amended complaint by order dated December 8, 1988. An amended

---

[1] The suit was filed in this Court and styled *Estate of Buice v. Knight*, 1:87cv517GR. Chicago has requested that the proceedings in 1:87cv517GR be incorporated in this suit. Some of the findings of fact from the memorandum opinion issued in that case will be used in this opinion.

complaint was filed December 27, 1988, adding Knight[2] individually d/b/a SKSF as a defendant. (Chicago's Summ. J. Mot. Exh. 12.) Knight, the named insured in the Chicago policy, was served with process in the suit on February 6, 1989. (United States District Court Docket for 1:87cv517GR, Form DC-111, p. 3.) Knight testified that he did not inform USF&G or his insurance agent, Burt Young, that he was being sued. (Trans. in 1:87cv517GR [hereinafter Trans.], p. 101.)

Floyd Logan, counsel for the Buice estate, sent a copy of the complaint in 1:87cv517GR to Young who forwarded a copy of the complaint to USF&G on or about April 27, 1988, *Id.*, Exh. 8, p. 29. USF&G retained Stanford Morse, Jr., in August 1988 as counsel to defend SKSF. (Pl.'s Summ. J. Mot., Exh. J.) Morse filed an answer on behalf of SKSF on August 12, 1988. *Id.*, Exh. K. The answer admitted Brock's negligence but denied that he was acting in the scope of employment at the time of the accident. *Id.*, pp. 1-2. USF&G sent no reservation of rights notice to Knight or Chicago, and neither Knight, USF&G or Young forwarded notice of the lawsuit to Chicago. (Chicago's Summ. J. Mot., Exhs. 6, 8.)

Morse met with Knight and informed him that the insurance policies provided no coverage for the incident and told Knight he would have to retain his own attorney. (Trans., pp. 103, 117.) Morse also sent a letter to Knight,

---

[2] Pursuant to Federal Rule of Civil Procedure 25(a)(1), Steve Mark Knight, Administrator of the Estate of Willie Steve Knight, Jr., was substituted as the party plaintiff in place of Steve Knight, Jr. d/b/a Steve Knight Steel Fabricators on May 12, 1994.

dated September 21, 1988, advising him that USF&G "does not insure the above-referenced claim" and informing Knight that a motion to withdraw would be filed, and that Knight should file any written objections to the motion to withdraw with the United States District Court Clerk. (Exh. D1-26.) Morse filed his motion to withdraw as counsel for SKSF on September 22, 1988. (Pl.'s Summ. J. Mot., Exh. M.) The motion stated that after Morse appeared to afford Knight a defense, USF&G determined that the BAP and Trucker's policy afforded no coverage on the vehicle involved in the accident. (Mot. to Withdraw, Exh. A, Morse Aff.; Pl.'s Resp. to Summ. J. Mot., Exhs. L & M.) The policies did not provide coverage because they did not list Brock's vehicle as a covered vehicle. (Pl.'s Resp. to Summ. J. Mot., Exh. M.) Morse was allowed to withdraw as attorney of record for SKSF on January 23, 1989. (Exh. D1-35.)

Knight testified that he spoke to Joe Montgomery about the lawsuit after Morse withdrew. (Trans., pp. 103, 115.) Knight stated that no attorney appeared before the court on his behalf in the lawsuit. *Id.*, p. 104. Knight testified that he brought all letters regarding the pending default to Montgomery's attention and apprised Montgomery that he could "do anything you need to do" on Knight's behalf in the suit. *Id.*, pp. 104, 116. Montgomery appeared as counsel for the plaintiff in Young's deposition held on October 24, 1989. (Exh. Chi-23.) Montgomery also appeared at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (Exh. P-13, 14.) In a letter dated April 6, 1989, Montgomery demanded separate counsel be appointed for Knight and indicated that Knight was unable to employ an attorney to defend him in the *Buice*

lawsuit. (Chi. Summ. J. Mot., Exh. 8, Montgomery letter.) Montgomery appeared at the bench trial of the garnishment action and stated that he did not represent Knight during the *Buice* proceedings.

Montgomery wrote a demand letter to USF&G, with copies to Crystal Springs Insurance Agency and Floyd Logan, on February 9, 1989. (Exh. Chi-24.) Montgomery sent follow up letters to USF&G on February 24; April 6; April 14; April 19; and May 5, 1989. (Exhs. Chi-25, Chi-26, Chi-27; Pl.'s Resp. to Summ. J. Mot., Exhs. P, Q, R, S, & T.) Morse responded to the February 9 letter by indicating that the identified policy did not cover the Buice claims. (Pl.'s Resp. to Summ. J. Mot., Exh. W.) Further letters to Montgomery from Morse clarified USF&G's position that coverage did not exist under the policies for the incident and that USF&G had no duty to defend Knight. *Id.*, Exhs. X, Y, Z, & AA; Exh. Chi-16. Knight testified that he felt Montgomery would be authorized to give notice to the insurance company of the accident, if the need to notice was there. (Trans., p. 116.)

On March 28, 1989, the Buice estate filed a motion to strike Knight's answer and for entry of default judgment against Knight. *Id.*, Exh. 13. The Court entered a default judgment in the amount of $1,173,591 against SKSF and Knight individually on June 18, 1990. (Exh. D1-3.) The judgment, based on the Magistrate Judge's report and recommendation, found the accident was caused by Brock's negligence and that Brock was in the course and scope of his employment with Knight at the time of the accident. (Exhs. D1-3 and P-8.) A writ of garnishment was issued against USF&G and Chicago on September 26, 1990. As a result of the default judgment, plaintiff sought

a writ of garnishment against USF&G and Chicago based on the insurance policies issued to Knight. *Id.*, Exh. 14.

The complaint in this action maintains that Knight notified the defendants of the *Buice* lawsuit, that he cooperated with the insurance companies at all times, and performed all his obligations under the relevant provisions. (Compl., p. 3.) Knight further maintains that USF&G answered the *Buice* suit on his behalf, began a defense and then withdrew, compelling him to seek and retain his own attorney. *Id.*, p. 4. Knight asserts that Chicago failed to defend him in spite of policy provisions that Chicago would defend regardless of whether another insurance policy was in effect at the time of the incident giving rise to the lawsuit. *Id.*

As a result of these allegations and the defendant insurance companies' refusal to defend, Knight asserts that the defendants' conduct rises to the level of tortious breach of contract causing him anxiety, worry, mental and emotional distress; incidental damages; and damages under the contract under the terms of the insurance policies. *Id.*, p. 5. Knight also seeks punitive damages. *Id.*

Trial of the garnishment action, 1:87cv517GR, was held on December 14-15, 1992, in this Court. Chicago relies on the trial record from the garnishment action in support of its motion for partial summary judgment in the instant case. (Chicago's Rebuttal Mem., pp. 1-2.)

USF&G maintains that the bench opinion issued in the garnishment action is dispositive of all claims in the bad faith action. (USF&G's Resp., p. 2.) USF&G asserts that if there is no coverage under the policy, there is no

duty to defend. *Id.* USF&G contends that the bench opinion establishes as a matter of law that USF&G had an arguable or legitimate reason not to defend Knight in the underlying action. *Id.*

II. The Insurance Policies

USF&G had issued five policies to SKSF: Business Auto Policy No. BAP 041146688; Truckers Policy No. 026084300; and a General Liability Policy No. 025165294. A commercial umbrella policy[3] was issued to Steve Knight/SKSF by Chicago. All of these policies were in effect for the period November 10, 1983, to November 10, 1984.

Brock had purchased the pickup truck involved in the fatal accident from Knight about two months prior to the accident. *Id.*, pp. 49, 58. Knight transferred title to the vehicle to Brock to enable Brock to obtain financing on the truck. *Id.*, p. 92. The truck was removed by endorsement from Knight's Business Auto Policy [BAP] on June 1, 1984. Brock procured automobile liability insurance policy on the pickup with Reliance Insurance [Reliance] which commenced coverage on June 1, 1984. The policy limits on the Reliance coverage were paid to the Buice estate.

Knight procured the relevant insurance policies for SKSF through Young. Young secured the general comprehensive liability policy, the BAP, and a truckers policy

---

[3] The policy number was 55C-2048572.

from USF&G and an excess policy from Chicago. The amounts of the applicable policies were as follows:

Chicago Umbrella Policy	$ 1,000,000
BAP	500,000
General Liability Policy	300,000
Truckers Policy	500,000

Young sold, collected the premiums, and received a commission on the insurance policies for Knight's business. Young, doing business as Crystal Springs Insurance Agency [Crystal Springs], was an agent for USF&G. (Chicago's Summ. J. Mot., Exh. 8, Depo. Exh. 4.) Young completed a short form and renewal application on the umbrella policy on behalf of Knight d/b/a SKSF on a Williams Marketing Associates, Inc. [Williams Marketing], form for the policy period November 10, 1983 to 1984. *Id.*

Williams Marketing forwarded a request for a "renewal quote" on Knight's umbrella policy on October 28, 1983. (Exh. Chi-2.) On November 1, 1983, Interstate Insurance Group [Interstate], sent Williams Marketing a quote on the policy, indicating that Chicago would be the insurer. (Exh. Chi-3.) Williams Marketing accepted the quote and requested policy on November 3, 1993, with a second request sent on November 22, 1983. (Exh. Chi-4, 5.)

F.W. Williams Agency [Williams Agency] contracted with USF&G as their exclusive representative for writing USF&G policies in Mississippi prior to 1982. Williams Marketing was a wholly-owned subsidiary of Williams Agency. Williams Marketing gave Williams Agency the

ability to write excess and surplus lines[4] that Williams Agency could not write.

In 1982, USF&G purchased Williams Agency and Williams Agency became a wholly-owned subsidiary of USF&G. Soon after the purchase, Williams Marketing's name changed to F & G Markets [F & G], remaining the wholly owned subsidiary of USF&G until sold in 1989. Interstate, the owner of Chicago and F & G entered an agreement wherein F & G became the recognized broker for Chicago in March 1987. The agreement provided in pertinent part as follows:

> Claims. The BROKER agrees to do everything possible to safeguard the interests of INTERSTATE and shall immediately report to INTERSTATE, with full details, any fact, occurrence or incident that may result in a claim or loss or increased risk of loss to INTERSTATE. The BROKER shall forward all claims, suits and notices of loss and cooperate fully with INTERSTATE to facilitate the investigation, adjustment, settlement and payment of any claim when and as requested by INTERSTATE. The BROKER will assist INTERSTATE in the collection of any deductible due from the insured.
>
> **WAIVER** The forbearance, neglect or failure by INTERSTATE to enforce any or all of the provisions of this Agreement or to insist upon strict compliance by the BROKER shall not be construed as a waiver of any rights or privileges of

---

[4] This included directors and officers liability, certain types of malpractice coverage, umbrella coverage and the like. (Exh. P-12, p. 9).

> INTERSTATE. A waiver of a past act or circumstance shall not constitute or be a course of conduct or waiver of any subsequent action or circumstance.

(Exh. P-10, pp. 3 & 4.)

The BAP issued by USF&G contained a non-vehicle endorsement JXN 154-B which provided as follows:

> It is agreed that the unqualified word 'insured' wherever it is used in Part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: *The following limitation does not apply* with respect to private passenger automobiles, or *to operation of other automobiles while being used solely fur business purposes in connection with your business.*
>
> By acceptance of this endorsement, the insured agrees that this limitation shall be continuously in force, including subsequent renewals, until terminated by mutual consent.

(Exh. P-1, emphasis added.)

The term "nonowned automobile" is defined within the policy as follows: "Only those **autos you** do not own, lease, hire, or borrow which are used in connection with **your** business. This includes **autos** owned by **your** employees or members of their households but only while used in **your** business or **your** personal affairs." (Exh. P-1, p. 5, emphasis in original).

The umbrella policy issued by Chicago provided the following directives regarding notice:

> In the event of any loss insured by this policy you should IMMEDIATELY contact your agent or broker or wire this company collect.

(Exh. P-4, Chicago Ins. Policy Title Page.)

> **CONDITIONS**
>
> **C. Notice of Occurrence.** When an occurrence takes place which is likely to give rise to a claim under this policy, written notice thereof shall be given to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.
>
> The insured shall give like notice of any claim made on account of such occurrence. If legal proceedings are begun the insured, when requested by the company, shall forward to it each paper thereon, or a copy thereof, received by the insured or the insured's representatives, together with copies of reports of investigations made by the insured with respect to such claim proceedings.

(Exh. P-4, Jacket Page 4.)

III. Notice to the Insurance Companies

Brock testified that Glenda Hunnicutt, Knight's secretary, called Young on the Monday following the accident to inform the agency of the accident at Knight's direction. (Trans., p. 60.) Hunnicutt testified that Knight stopped by her house on Saturday to tell her about the accident and

instructed her to call Young on Monday to report the incident. *Id.*, p. 67. She testified that she spoke to Gae Powell, an insurance clerk, and then Young. *Id.*, p. 68. She stated that Young told her that he would "handle it" and did not ask for further information. *Id.* Knight was aware that Hunnicutt had procured personal insurance for several of Knight's employees. *Id.*, pp. 109-110. Hunnicutt often helped Brock with his personal affairs. *Id.*, p. 60. During Hunnicutt's conversation with Young's office, no one questioned her whether Brock was on duty at the time of the accident. *Id.*, p. 76.

Young stated that Hunnicutt reported Brock's accident by a phone call to his office. *Id.*, p. 132. He stated that neither Knight or Hunnicutt specified whether to report the accident as connected with Knight's business. *Id.*, p. 148. Young stated that he made the decision to report the accident to Reliance and not to USF&G or Chicago because he decided since the truck was removed from Knight's policy, it was not covered by his policy. *Id.*, p. 160. Young testified that Hunnicutt was reporting the accident for Brock to trigger coverage on his individual policy. *Id.* pp. 160, 170.

Young prepared an ACORD[5] loss form and sent it to United Pacific[6] in connection with Brock's accident. (Exhs. D-14 and D-15; *Id.*, p. 133.) Young stated that an ACORD notice is the customary way of giving written

---

[5] An ACORD loss form is the loss notice designed for private industry automobile losses, according to Young's testimony. (Trans., p. 133.)

[6] United Pacific is a wholly owned subsidiary of the Reliance Group.

notice of a loss in the insurance industry. *Id.*, p. 146. An ACORD form was not prepared or sent to USF&G until April 1988 when Young received a letter from Floyd Logan informing him of the claim against Knight. *Id.*, p. 134. Young testified that an ACORD loss notice was never sent to Williams Marketing. *Id.*, p. 145.

A. Notice to USF&G

Powell, who no longer worked for Young at the time of the trial, testified that USF&G's Jackson claims office was sent a notice regarding the accident in April 1988. *Id.*, p. 226. A copy of the loss notice for Brock's loss was sent to USF&G with Knight's notice. *Id.*, p. 240.

Young testified that the only coverage afforded by the BAP at the time of the accident was for "specifically described autos", meaning only the autos described in Item Four of the policy were covered under the policy. (Trans., p. 125.) Young further testified that neither the BAP nor the other policies in effect contained non-owned or hired coverage. *Id.* Young identified the effective date of the removal of the truck from the BAP policy as June 1, 1984. *Id.*, p. 128.

Forest Holder, Sr., former claims office supervisor for USF&G, testified that when he received notice of the Buice accident in 1988 he determined that no coverage was afforded the Brock vehicle under any of the policies in effect. *Id.*, p. 246. He stated that the Brock vehicle was not listed on the truckers policy, or the BAP, and that the comprehensive general liability policy did not extend coverage to automobiles. *Id.*, pp. 246-247. He testified that

the endorsement marked as exhibit D1-14[7] did not extend coverage to the vehicle in question because it was not used solely for business purposes. *Id.*, p. 248. Holder testified that USF&G had factual information from their attorney (Morse) that Brock was not on business for Knight at the time of the accident. *Id.*, p. 259. Holder testified that he never got a written opinion from Morse regarding whether JXN-154-B extended coverage for the incident under the BAP. *Id.*, p. 268. Holder stated that the standard symbol indicating that non-owned vehicles were covered under the policy was not present in the BAP. *Id.*, p. 270.) [sic]

Darrell Ezell, a claims adjustor for USF&G, testified he also determined that there was no coverage under the policies. *Id.*, p. 277. He stated that in making this determination, USF&G had a copy of the investigating officer's report; of Brock's insurance policy; and knowledge of the facts of the manslaughter case along with copies of the three relevant policies. *Id.* Ezell also testified that the agent ordinarily notifies the excess carrier of a claim. *Id.*, p. 284.

Ezell stated that the declarations page of the BAP contained a notice that JXN-154-B was an endorsement to the policy. *Id.*, p. 279. Ezell indicated that Morse's letter regarding coverage under the policies stated that there was no coverage under the BAP policy because the vehicle was not a specifically described vehicle. *Id.*, p. 288. Ezell testified there is a difference between being "solely on business for your employer" and acting in the scope of

---

[7] This is the JXN-154-B policy endorsement.

employment, adding that the person's sole purpose must be for business of the employer to secure coverage under JXN-154-B. *Id.*, p. 298. He reiterated that he did not receive an opinion to this effect for Morse or the Jackson office, which authored the endorsement. *Id.*

USF&G contends that the Court's ruling in the garnishment action provides support for the preclusion of punitive damages. (USF&G's Partial Summ. J. Mot., pp. 4-8.) USF&G also argues that under Mississippi law a bad faith claim involving punitive damages requires coverage under the policy. *Id.*, p. 8.

B. Notice to Chicago Insurance

Notice of the suit and all suit papers were sent to Crystal Springs on April 21, 1988. In October 1988, after receiving notification of Knight's lawsuit, Young's office called Williams Marketing to inquire about the potential for coverage. Young's office spoke to a party identified only as "Lina." A follow-up memo sent after the conversation stated the following:

> Umbrella coverage only extends the coverage of the primary underlying coverages. If non-owned and hired is not on the primary, the umbrella would not provide this coverage. Need to be sure non-owned and hired is not on the primary.

Id., p. 208; Exh. H.

Young testified that all of the policies in effect on Knight's operation were kept in one file. *Id.*, p. 171.

Young did not ask Williams Marketing to make the determination whether non-owned and hired was on the primary policy but relied on his own and USF&G's determination of that information. *Id.*

Nancy Again, an employee of Interstate[8], testified that the usual source of claims notices were agents, insureds, and other carriers. (Exh. P-13, p. 6). She testified that a claim investigation basically uses the information obtained by the primary carrier, because Interstate's liability did not kick in until the primary carrier's coverage was exhausted. *Id.* According to Interstate's log entry regarding this accident, the first notification of the loss was in October 1990. (Exh. P-13, p. 20).

Loren Roberts, a casualty claim representative for Interstate, testified that Interstate's first notice came from USF&G in October 1990. (Exh. P-14, p. 5.) He stated that Duane Harris with USF&G informed him that the original claim was denied because the vehicle involved in the accident was not a "scheduled"[9] vehicle. *Id.*, p. 10. Roberts testified that Knight never informed Chicago that USF&G was not going to defend, nor requested that Chicago take up Knight's defense. *Id.*, p. 39. Roberts sent a notice to W. Scott Welch, III, Chicago's attorney, on October 10, 1990. (Exh. CC.) The notice contained the following information:

---

[8] Interstate underwrites policies for Chicago Insurance Company. (Exh. P-15, p. 10).

[9] A "Scheduled" vehicle under an insurance policy is an insurance term which relates to a list of property and the value of each piece of such property for which the insurer will pay in the event of loss or damage. *Black's Law Dict.* 5th Ed., p. 1206.

> Our clm. # 05-5-2-32562. Our insd: Steve Knight d/b/a Steve Knight Steel Fabricators. Clmt: William Ramsey Buice, adms D/A Undetermined.
>
> Per our phone conversation, attached is copy of material received from Ms Dept Ins & copy of our Dec sheets. Cert'ed copies of our policy will follow shortly.
>
> *Please do the necessary to protect [or protest, copy illegible] the interest of Chicago Ins Co ONLY & keep us advised.*

(Exh. CC, emphasis added.)

Patsy Johnson, underwriting line manager for umbrella and excess policies for Interstate, testified that non-owned and hired vehicles would be covered under the umbrella policy as long as the primary insurance covered them. (Trans., Exh. P-15, p. 28.) Interstate does Chicago's underwriting and was described as being similar to a parent company of Chicago. *Id.*, pp. 10-11.

Chicago contends that Young had no contractual relationship with Chicago. (Chicago's Rebuttal Memo., p. 2.) Chicago contends that Williams Marketing was listed as a broker under contract with Chicago, and that the policy was countersigned by Eugene Clark of Williams Marketing as the "Licensed Resident Agent". *Id.*, pp. 2-3. Chicago maintains that Knight's alleged failure to notify Chicago of the underlying claim; to forward pleadings filed in the Buice lawsuit; to tender defense of that lawsuit to Chicago; to investigate or defend that lawsuit himself result in a failure to satisfy conditions precedent to coverage under the Chicago policy which terminates any obligation Chicago may have had toward Knight.

(Chicago's Summ. J. Mot., pp. 5-6.) The Chicago policy contained the following notice:

> In the event of a claim or suit to which the company's defense-settlement undertaking applies, the insured shall immediately forward to the company every demand, notice, summons or other process pertaining to such suit.

(Exh. Chi-7, p. 3.) Chicago maintains that no demand was made to Chicago to assume defense of the lawsuit after USF&G withdrew their defense of the suit. *Id.*, p. 6. Chicago's coverage denial was entered after receiving pleadings in the garnishment action. *Id.*

Standard of Review

A grant of summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party " . . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . " Fed.R.Civ.P. 56(c). In determining whether there are any genuine issues of material fact, this Court must first turn to the applicable law to discern what factual issues are, indeed, material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Fields v. City of S. Houston, Tex.*, 922 F.2d 1183, 1187 (5th Cir. 1991). Then, the Court must examine the evidence of the type listed in Rule 56(c) to detect the existence or non-existence of a material issue. *Fields*, 922 F.2d at 1187. Further, " . . . summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such

that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Conclusions of Law

This Court has jurisdiction of the claims before it by virtue of diversity of citizenship. Consequently, it is *Erie*-bound to apply Mississippi substantive law. *Eichenseer v. Reserve Life Ins. Co.*, 682 F.Supp. 1355, 1361 (N.D. Miss. 1988), *aff'd* 881 F.2d 1355 (5th Cir. 1989); *see also Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

An insurer's duty to defend an action against its insured is governed by the pleadings; if the facts within the pleadings bring the incident within the coverage of the policy, the insured must defend, regardless of the outcome of the action. *Battisti v. Continental Casualty Co.*, 406 F.2d 1318 (5th Cir. 1969). A duty to defend is also implicated when a potential for coverage under the policy exists. *See E.E.O.C. v. Southern Publishing Co., Inc.*, 705 F.Supp. 1213, 1218 (S.D.Miss. 1988), *aff'd* 894 F.2d 785 (5th Cir. 1990). If the insurer has wrongfully refused to defend, the insured may recover the costs and attorney's fees incurred in defending claims made against the insured. *See Brickell v. United States Fire Ins. Co.*, 436 So.2d 797 (Miss. 1983).

A duty to defend is not disposed of by a determination of the insurer's ultimate liability; an insurer's duty to defend is determined by the allegations of the complaint. *Ware v. Carrom Health Care Prods., Inc.*, 727 F.Supp. 300, 307 (N.D.Miss. 1989); *Preferred Risk Mut. Ins. Co. v. Poole*, 411 F.Supp. 429, 439-40 (N.D.Miss. 1976). The Court may

address the allegations of this complaint, regardless of the outcome of the garnishment action.

Punitive damages are recoverable provided Knight can establish two things: (1) that the insurers denied the claim without legitimate or arguable reason; and (2) that the insurers acted with gross and reckless disregard for the insured's rights so that the action becomes a heightened tort. *Hall v. Allstate Life Ins. Co.*, 737 F.Supp. 1453, 1456 (N.D.Miss. 1990). Whether an arguable reason existed for denying the claim is typically a question of law, while the claim that the insurer denied the claim maliciously or in a grossly negligent manner is an issue for the trier of fact. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 269 (Miss. 1988), *aff'd* 486 U.S. 71.

In assessing the plaintiffs' claims for punitive damages the Court must decide whether or not there is a question of fact for the jury. The Fifth Circuit has stated, "[a] claim of bad faith denial thus 'should not reach the jury unless reasonable minds could differ as to the insurance company having a legitimate or arguable reason for denying the claim'." *Dueringer v. General Am. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (quoting *Pioneer life Ins. Co. of Ill. v. Moss*, 513 So.2d 927, 930 (Miss. 1987)); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1184 (Miss. 1990). Thus, when the issue of coverage or liability under the policy presents a "classic jury question", denial of the claim is then arguably reasonable and summary judgment is appropriate. *Szumigala v. Nationwide Mut. Ins. Co.*, 853 F.2d 274, 280 (5th Cir. 1988) (citing *Blue Cross & Blue Shield v. Campbell*, 466 So.2d 833 (Miss. 1984)).

"In the absence of an arguable reason, the trial court still must determine whether there is a jury issue as to the insurers having committed a wilful or malicious wrong, or acted with gross and reckless disregard for the insured's rights. If not, the question of punitive damages should not go to the jury." *Life & Casualty Ins. Co. v. Bristow*, 529 So.2d 620, 622 (Miss. 1988), *cert. denied* 488 U.S. 1009 (1989). There must be something beyond an ordinary tort; there must be a wrong which evidences "gross, callous, or wanton conduct, or . . . accompanied by fraud and deceit." *Bristow*, 529 So.2d at 622, quoting *State Farm Fire & Casualty Co. v. Simpson*, 477 So.2d 242, 250 (Miss. 1985). Under Mississippi law, punitive damages for the breach of an insurance contract may be levied "when an insurer's refusal timely to pay a just claim is sufficiently egregious that we label it an independent tort. Where an insurer has acted with malice or gross negligence and reckless disregard for the rights of the insured, punitive damages may be assessed." *Life Ins. Co. of Miss. v. Allen*, 518 So.2d 1189, 1193 (Miss. 1987) (citations omitted); *see also Eichenseer*, 682 F.Supp. at 1363; *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 293 (Miss. 1992). However, the conduct of an insurer cannot be termed bad faith nor can the company be held liable for punitive damages if the company had a "legitimate or arguable reason" for denying the claim. *Campbell*, 466 So.2d at 842; *Standard Life Ins. Co. v. Veal*, 354 So.2d 239, 248 (Miss. 1977).

When an insured complies with the notice provisions of a policy and gives notice to the insurer, the insurer has a duty to investigate to determine the true facts to any alleged exclusion from coverage. *Mavar Shrimp & Oyster*

Co. v. United States Fidelity & Guar. Co., 187 So.2d 871, 875 (Miss. 1966). Notice to an insurer's agent is imputed to the insurer regardless of contrary policy provisions. *National Life & Accident Ins. Co. v. Miller*, 484 So.2d 329 (Miss. 1985); *State of Miss. v. Richardson*, 817 F.2d 1203, 1207 (5th Cir. 1987). The applicable Mississippi statute provides as follows:

> Every person who solicits insurance on behalf of an insurance company, or who takes or transmits, other than for himself, an application for insurance or a policy of insurance, or who . . . gives notice that he will receive or transmit the same, or who shall review or transmit a policy of insurance of any such company, or who shall examine or inspect any risk, . . . or do so or perform any other act or thing in the making or consummation of any contract of insurance for or which any such insurance company, other than for himself, . . . whether any of such acts shall be done at the instance or request or by the employment of the insurance company, . . . shall be held to be the agent of the company for which the act is done . . . , whatever conditions or stipulations may be contained in the policy or contract.

Miss. Code Ann. § 83-17-1 (1972).

The Mississippi agency statute deals with an agency relationship in the broadest sense. *Richardson*, 817 F.2d at 1207. Notice to an agent is notice to the insurance company. *Id.*

I. USF&G's Duty to Defend

USF&G contends that it is entitled to summary judgment on the issue of punitive damages and extracontractual damages because this Court determined that a genuine issue of material fact existed regarding coverage under the policy. The USF&G policy contained the following requirement regarding notice:

> **CONDITIONS** The insurance provided by this policy is subject to the following conditions:
>
> YOUR DUTIES AFTER ACCIDENT OR LOSS.
>
> 1. **You** must promptly notify **us** or **our** agent of any **accident** or **loss. You** must tell **us** how, when and where the **accident** or **loss** happened. **You** must assist in obtaining the names and addresses of any injured persons and witnesses.

(Pl.'s Summ. J. Mot., Exh. A, p. 3, emphasis in original.)

Under the facts and circumstances as they existed at the time of USF&G's motion to withdraw as Knight's counsel, the Court is of the opinion that USF&G acted with reasonableness according to the law. There was no indication from the available information that the vehicle driven by Brock was covered under the USF&G policies, because the truck was dropped from the policies when Knight sold the truck to Brock. (Pl.'s Partial Summ. J. Mot., Exh. B and attachment.) USF&G's attorney, Standford Morse, examined the USF&G insurance policies and agreed with Ezell's finding that none of the policies covered the vehicle involved in the accident. *Id.*, Exh. B, Morse Aff. There was no indication that Brock was acting on behalf of anyone other than himself under the information available to USF&G at the time of the withdrawal

from Knight's defense. Ezell stated that he was led to believe that Brock was not acting in the course of his employment based on the fact that Brock was driving under the influence [DUI], that the accident happened at approximately midnight, and comparing that information with JXN-154-B. *Id.*, Exh. D, Ezell Depo. pp. 66-69. Although the failure to closely examine the policies for any other basis for coverage may be characterized as negligent, it does not fall within the parameters of gross negligence of malice which is required to trigger punitive damages in Mississippi. *Dueringer v. American Life Ins. Co.*, 853 F.2d 283, 286-87 (5th Cir. 1988).

If there is no basis for the imposition of punitive damages against USF&G, there is no basis to maintain Knight's claim for extracontractual damages against USF&G[10] The Court has concluded that USF&G had an arguable reason to deny the claim at the time it made the

---

[10] The Court is mindful of circumstances in which exceptions to a duty to defend arise, and hesitates to embrace the path followed by USF&G in this end result as certainly more prudent paths were available than the one chosen. *See e.g. Employers Reinsurance Corp. v. Martin, Gordon & Jones*, 767 F.Supp. 1355, 1363 (S.D.Miss. 1991) (an insurance company may defend with a reservation of rights to deny coverage at some later point); *Reliance Ins. Co. v. County Line Place, Inc.*, 692 F.Supp. 694, 698 (S.D.Miss. 1988) (reservation of rights may relieve the insurer of a duty to defend); *ABC Dist. Inc. v. Lumbermens Mut. Ins. Co.*, 646 F.2d 207, 209 (5th Cir. 1981) (no duty to defend, complaint alleged circumstances clearly in policy exclusions); *Preferred Risk*, 411 F.Supp. at 439-440 (declaratory judgment indicating no coverage as to claims under liability section of policy relieved insurer's duty to defend pending actions); *see generally* 14 *Couch on Insurance* (2d Ed.) § 51:220.

decision to withdraw from Knight's defense. Therefore, the company is protected against both punitive and extra-contractual damages. *Hans Constr. Co. v. Phoenix Assurance Co.*, 995 F.2d 53 (5th Cir. 1993), *reh'g denied* August 3, 1993. The Court finds that USF&G should be dismissed from this suit with prejudice.

II. Chicago's Duty to Defend

Because Young forwarded the application to Williams Marketing and received a quote, Young "took or transmitted" Knight's application for umbrella coverage to Chicago. *Richardson*, 817 F.2d at 1208. Knight notified Young of the accident the Monday following the incident. Young testified that he decided which insurance companies to notify based on his knowledge of the situation. Testimony also establishes that Young's office communicated with Williams Marketing and discussed the possibility of coverage in October 1988, before default was entered against Knight. The Chicago policy and testimony by Nancy Agin establishes that notice to the agent constituted notice to the company. (Exh. P-4, Chicago Ins. Policy Title page; Exh. P-13, p. 6.)

In a letter to the Court, Chicago refers to the *Laster v. American Nat'l Fire Ins. Co.*[11] opinion, suggesting that the case is relevant to Montgomery's involvement with Knight. *Laster* is distinguishable in several respects from this case. First of all, unlike the attorney in *Laster*, nothing suggests that Montgomery was ever listed as Knight's

---

[11] 775 F.Supp. 985 (N.D.Tex. 1991), *aff'd* 966 F.2d 676 (5th Cir. 1992).

attorney of record, despite anything he may have done on Knight's behalf in the effort to secure coverage for Knight. Second of all, the language in the *Laster* insurance policy did not require a defense on behalf of Warren. *Laster*, 775 F. Supp. at 994-95. In this case, the Chicago policy included the following endorsement:

> Additional Insuring Agreement First Dollar Defense
>
> It is agreed that the following insurance Agreement is added to the policy:
>
> *Defense-Settlement*-With respect to any occurrence not covered by (1) the underlying policy (ies) [sic] listed in Declaration 7-Schedule of Underlying Insurance, or (2) any other underlying insurance available to the insured and provided such occurrence is covered by the terms and conditions of this policy, except for the amount of the retained limit stated in Declaration 5, the Company shall:
>
> (a) defend any suit seeking damage because of personal injury, property damage, or advertising liability, even if the allegations of such suit are groundless, false, or fraudulent, provided: (1) the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient, and . . . ;
>
> (b) pay all premiums on bonds to release attachments for any amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish any such bonds;
>
> (c) pay all expenses incurred by the company, all costs taxed against the insured in any such

> suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon; . . .
>
> and the amounts incurred under this agreement (except settlement of such claim or suit) or not a part of ultimate net loss and therefore are payable by the company in addition to the applicable limit of liability of this policy.

(Chicago's Summ. J. mot., Exh. 1, p. 4.)

The mandatory language in the Chicago additional insuring agreement distinguishes this case form *Laster,* where there was no defense obligation. *Laster,* 775 F.Supp. at 993. American National Fire Insurance Company [American], the insurer in *Laster* also offered their insured a defense which was rebuffed. *Laster,* 775 F.Supp. at 987, 995-7. The Court finds that the case proposed by Chicago is distinguishable from the circumstances involved in this case and not dispositive of Knight's claims against Chicago.

Whether any of Chicago's actions in its treatment of Knight's defense are enough to establish liability is yet to be resolved. In *Donahoo v. State Farm Mut. Auto. Ins. Co.,* 684 F.Supp. 911 (N.D.Miss. 1987) the court cited *Avril v. U.S.,* 461 F.2d 1090 (9th Cir. 1972) in stating that an insurance claim connoted more than mere notice of an accident and an injury. *Donahoo,* 684 F.Supp. at 913. There is no authority which required the defendant to pursue payment of a claim that had not been presented. Exactly what constitutes a "claim" is a question of fact to be resolved by the trier of fact. *Taylor Mach. Works, Inc. v.*

Great Am. Surplus Lines Ins. Co., 635 So.2d 1357, 1361 (Miss. 1994). That is also is a determination which remains to be resolved.

Furthermore, because the parties dispute the legitimacy of Chicago's delay in questioning the propriety of the claim and failure to conduct an investigation of the claim there is an [sic] question of material fact which precludes entering summary judgment in this matter on behalf of Chicago or the plaintiff. *Stamps v. Estate of Watts*, 528 So.2d 812, 815 (Miss. 1988). Chicago's motion for summary judgment shall be denied.

Conclusion

For the reasons discussed *supra*, the Court finds that the defendant USF&G's motion for summary judgment should be granted. Furthermore the Court finds that defendant Chicago and plaintiff's motions for summary judgment should be denied.

Counsel for defendant USF&G shall submit an order in conformity with and incorporating be reference the foregoing Memorandum Opinion within ten (10) days of the date of entry hereof, each party to bear his/its own costs.

DATED, this the 14th day of November, A.D., 1994.

/s/ Walter J. Gex, III
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60861

STEVE KNIGHT, JR., D/B/A Steve Knight Steel Fabricators and STEVE MARK KNIGHT, As Administrator of the Estate of Willie Steve Knight, Jr.,

Plaintiffs,

STEVE KNIGHT, JR., D/B/A Steve Knight Steel Fabricators,

Plaintiff-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY INS. CO and CHICAGO INSURANCE CO.,

Defendants,

UNITED STATES FIDELITY & GUARANTY INS. CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

---

ON PETITION FOR REHEARING

(November 2, 1995)

Before KING, SMITH and BEVAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied

ENTERED FOR THE COURT:

/s/ Fortunado P. Benavides
Fortunado P. Benavides
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion

that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES 1937 ADOPTION

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York

county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 159.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

1946 AMENDMENT

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco*, Cal. 1944, 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.*, C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.*, 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed. Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.*, C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works*, C.C.A.7, 1946, 154 F.2d 214; 3 Moore's Federal Practice, 1938, 3190-3192. Since

interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.*, supra. See also *Audi-Vision, Inc. v. RCA Mfg. Co.*, C.C.A.2 1943, 136 F.2d 621; *Toomey v. Toomey*, App.D.C. 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works*, supra; *Catlin v. United States*, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 AMENDMENT

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice & Procedure 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces

some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not supposititious, [sic] conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir.1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F.Supp. 383 (D.Del.1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa.1958); *Bunny Bear Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa.1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa.1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidertiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED, WILLIAM RAMSEY BUICE, ADMINISTRATOR — PLAINTIFF

VS. — CIVIL ACTION NO. 1:87cv517GR

STEVE KNIGHT, JR., STEEL FABRICATORS, INC., and/or STEVE KNIGHT, JR., INDIVIDUALLY, d/b/a STEVE KNIGHT, JR., STEEL FABRICATORS, INC. — DEFENDANTS

UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY and CHICAGO INSURANCE COMPANY — GARNISHEES

BENCH OPINION

(Filed April 21, 1994)

This cause came on for trial before the Court without a jury on December 14, 1992.[1] The Court, having fully considered the testimonial and documentary evidence presented by both parties at trial, the arguments of counsel, and the applicable law, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

---

[1] An order was entered on December 4, 1992, severing *Knight v. United States Fidelity & Guaranty and Chicago Insurance Company*, Civil Action No. 1:91cv352GR from this cause.

Findings of Fact

The plaintiff, Estate of Mary Virginia Buice, instituted a garnishment action against United States Fidelity and Guaranty Company [USF&G], and Chicago Insurance Company [Chicago] to satisfy a default judgment entered against Steve Knight, Jr.,[2] d/b/a Steve Knight Steel Fabricators, Inc., [SKSF] in June 1990. This lawsuit originated from an accident which occurred in 1984. Gary Brock, an employee of SKSF, while driving his personal vehicle, struck the vehicle of Mary Virginia Buice, resulting in fatal injuries to Ms. Buice.

Brock had purchased the pickup truck from Steve Knight. The truck was removed by endorsement from Knight's Business Auto Policy [BAP] on June 1, 1984. Brock procured automobile liability insurance policy on the pickup with Reliance Insurance which commenced coverage on June 1, 1984. The policy limits on the Reliance coverage were paid to the Buice estate.

USF&G issued five policies to Knight's business, three of which were in force during the period November 11, 1983, to November 10, 1984; Business Auto Policy No. BAP 041146688; Truckers Policy No. 026084300; and a General Liability Policy No. 025165294. A commercial umbrella policy[3] was issued to Steve Knight/SKSF by Chicago.

---

[2] Pursuant to Federal Rule of Civil Procedure 25(a)(1), Chicago submitted a suggestion of death upon the record of Steve Knight, Jr., on December 8, 1993.

[3] The policy number was 55C-2048572.

Burt Young was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies for Knight's business. Young, doing business as Crystal Springs Insurance Agency [Crystal Springs], was an agent for USF&G with authority to bind policies.

Young took Knight's application for the umbrella policy with Williams Marketing Associates [Williams Marketing], financed the premiums, and received a commission for the sale of the policy. F.W. Williams Agency [Williams Agency] contracted with USF&G as their exclusive representative for writing USF&G policies in Mississippi prior to 1982. Williams Marketing was a wholly-owned subsidiary of Williams Agency. Williams Marketing gave Williams Agency the ability to write excess and surplus lines[4] that Williams Agency could not write.

USF&G purchased Williams Agency in 1982. At that time Williams Agency became a wholly-owned subsidiary of USF&G. Soon after the purchase, Williams Marketing's name changed to F & G Markets [F & G], remaining the wholly owned subsidiary of USF&G until sold in 1989. Interstate Insurance Group [Interstate], the owner of Chicago and F & G entered an agreement wherein F & G became the recognized broker for Chicago in March

---

[4] This included directors and officers liability, certain types of malpractice coverage, umbrella coverage and the like. (Exh. P-12, p. 9).

1987. The agreement provided in pertinent part as follows:

> Claims. The BROKER agrees to do everything possible to safeguard the interests of INTERSTATE and shall immediately report to INTERSTATE, with full details, any fact, occurrence or incident that may result in a claim or loss or increased risk of loss to INTERSTATE. The BROKER shall forward all claims, suits and notices of loss and cooperate fully with INTERSTATE to facilitate the investigation, adjustment, settlement and payment of any claim when and as requested by INTERSTATE. The BROKER will insist INTERSTATE in the collection of any deductible due from the insured.
>
> **WAIVER.** The forbearance, neglect or failure by INTERSTATE to enforce any or all of the provisions of this Agreement or to insist upon strict compliance by the BROKER shall not be construed as a waiver of any rights or privileges of INTERSTATE. A waiver of a past act or circumstance shall not constitute or be a course of conduct or waiver of any subsequent action or circumstance.

(Exh. P-10, pp. 3 & 4.)

The amounts of the applicable policies were as follows:

Chicago Umbrella Policy	$1,000,000
Business Auto Policy	550,000
General Liability Policy	300,000
Truckers Policy	500,000

The BAP contained a non-vehicle endorsement JXN 154-B which provided as follows:

> It is agreed that the unqualified word 'insured' wherever it is used in part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: *The following limitation does not apply* with respect to private passenger automobiles, or *to operation of other automobiles while being used solely for business purposes in connection with your business.*
>
> By acceptance of this endorsement, the insured agrees that this limitation shall be continuously in force, including subsequent renewals, until terminated by mutual consent.

(Exh. P-1.) (emphasis added.)

The term "nonowned automobile" is defined within the policy as follows: "Only those **autos you** do not own, lease, hire, or borrow which are used in connection with **your** business. This includes **autos** owned by **your** employees or members of their households but only while used in **your** business or **your** personal affairs." (Exh. P-1, p. 5.) (emphasis in original.)

The umbrella policy issued by Chicago, which was in full force and effect on the date of the accident, provided the following directives regarding notice:

> In the event of any loss insured by this policy you should IMMEDIATELY contact your agent or broker or wire this company collect.

(Exh. P-4, Chicago Insurance Policy Title Page.)

> **CONDITIONS**
>
> **C. Notice of Occurrence.** When an occurrence takes place which is likely to give rise to a claim under this policy, written notice thereof shall be given to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.
>
> The insured shall give like notice of any claim made on account of such occurrence. If legal proceedings are begun the insured, when requested by the company, shall forward to it each paper thereon, or a copy thereof, received by the insured of the insured's representatives, together with copies of reports of investigations made by the insured with respect to such claim proceedings.

(Exh. P-4, Jacket Page 4.)

I. Notice Received by the Insurance Companies

Brock had worked at Knight's gravel pit operation in Nicholson, Mississippi, during the day of the accident. (Trans., p. 50.) Brock testified that he was on call 24 hours a day in case barges needed docking at night. (Trans., p.

48.) Brock went to Port Bienville to collect his pay and at that time, Knight informed Brock that he was needed at the facility that evening to tie up barges which were expected to arrive later. (*Id.*) Brock informed Knight that he was planning to go to Slidell, Louisiana, to eat. (*Id.*) Brock received Knight's permission to leave the jobsite to eat provided Brock returned in time to tie up the barges when they arrived. (*Id.*) Brock went to Slidell, stopped at his friend's home to invite her to eat, then proceeded to the restaurant. (*Id.*, p. 51.) Brock started back to Port Bienville, stopping at the Time Saver store to purchase two beers. (*Id.*) The fatal accident happened while Brock was on his way back to meet the barges after these events. (*Id.*) Brock testified he was being paid for his activities at the time of the accident. (*Id.*)

Brock was using his personal vehicle at the time the accident happened. (*Id.*, p. 49.) The testimony established that Brock purchased the truck from Knight about two months prior to the accident. (*Id.*, pp. 49, 58.) Knight had transferred title to the vehicle to Brock to enable Brock to obtain financing on the truck. (*Id.*, p. 92.)

Knight testified that Brock stayed at the Port Bienville facilities when he was working. (*Id.*, p. 94.) Knight stated that Brock stayed in a trailer on the premises "rent free" because the use of the trailer was included in his salary. (*Id.*, p. 98.) On cross examination, Knight was questioned about deposition testimony he gave in 1988 in which he stated there was not a barge expected at the Port Bienville facility on the night of the accident. (*Id.*, pp. 95-96.) Knight stated he made a mistake in the earlier testimony, stating he "had a lot on my mind", because he was in bankruptcy and had "just lost representation from

my insurance company." (*Id.*, pp. 96-97.) Knight testified that Brock was returning to the yard to tie up a barge during Brock's manslaughter trial. (*Id.*, p. 119.)

Brock testified that Glenda Hunnicutt, Knight's secretary, called young on the Monday following the accident to inform the agency of the accident as Hunnicutt often helped Brock with his personal affairs. (*Id.*, p. 60.) Hunnicutt testified that Knight stopped by her house on Saturday to tell her about the accident. (*Id.*, p. 67.) Knight instructed her to call Young on Monday to report the incident. (*Id.*) She testified that she spoke to Gae Powell, an insurance clerk, and then Young. (*Id.*, p. 68.) She stated that Young told her that he would "handle it" and did not ask for further information. (*Id.*) Knight was aware that Hunnicutt had procured personal insurance for several of Knight's employees. (*Id.*, pp. 109-110.) During Hunnicutt's conversation with Young's office, no one questioned her whether Brock was on duty at the time of the accident. (*Id.*, p. 76.)

Nancy Agin, an employee of Interstate[5], testified that usually notices of claims came from agents, insured, and other carriers. (Exh. P-13, p. 6.) She testified that a claim investigation basically uses the information obtained by the primary carriers, as Interstate's liability did not kick in until the primary carrier's coverage was exhausted. (*Id.*) According to Interstate's log entry regarding this accident, the first notification of the loss was in October 1990. (Exh. P-13, p.20.)

---

[5] Interstate underwrites policies for Chicago Insurance Company. (Exh. P-15, p. 10).

Loren Roberts, a casualty claim representative for Interstate, also testified that Interstate first received notice from USF&G of the Buice Claim in October 1990. (Exh. P-14, p. 5.) He stated that Duane Harris with USF&G informed him that the original claim was denied because the vehicle involved in the accident was not a "scheduled"[6] vehicle. (*Id.*, p. 10.) Roberts testified that Knight never informed Chicago that USF&G was not going to defend, nor requested that Chicago take up Knight's defense. (*Id.*, p. 39.)

Patsy Johnson, underwriting line manager for umbrella and excess policies for Interstate National Corporation, Inc., testified regarding the scope of umbrella policies. (Exh. P-15, p. 14.) Interstate, which does the underwriting for Chicago, was described as being similar to a parent company of Chicago. (*Id.*, pp. 10-11.) Umbrella policies are broader than excess policies and afford excess coverage to employer's liability, auto liability and general liability policies. (*Id.*) Johnson testified that non-owned and hired vehicles would be covered under the umbrella policy as long as the primary insurance covered them. (*Id.*, p. 28.)

Knight testified that Brock was using the truck involved in the accident as his personal vehicle. (Trans., pp. 92-93.) Brock had purchased the truck from Knight's business. (*Id.*, p. 92.) Knight testified that he did not inform USF&G or Young that he was sued. (Trans., p.

---

[6] A "scheduled" vehicle under an insurance policy is an insurance term which relates to a list of property and the value of each piece of such property for which the insurer will pay in the event of loss or damage. *Black's Law Dist.* 5th Ed., 1206.

101.) Knight indicated that his only contact with USF&G was through Stanford Morse. USF&G's retained attorney. (*Id.*, p. 103.) Morse informed Knight that there was no coverage under the insurance policy; that a motion to withdraw as counsel was filed in the suit; and that Knight should file any written objections to the motion to withdraw with the United States District Clerk. (Exh. D1-26.)

Knight testified that he spoke to Joe Montgomery about the lawsuit after Morse withdrew. (Trans., pp. 103, 115.) Knight stated that no attorney appeared before the court on his behalf in the lawsuit. (*Id.*, p. 104.) Knight testified that he brought all letters regarding the pending default to Montgomery's attention and apprised Montgomery that he could "do anything you need to do" on Knight's behalf in the suit. (*Id.*, pp. 104, 116.) Montgomery appeared as counsel for the plaintiff in Young's deposition held on October 24, 1989. (Exh. Chi-23.) Montgomery also appeared on Knight's behalf at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (Exh. P-13, 14.)

Montgomery wrote a demand letter to USF&G, with copies to Crystal Springs and Floyd Logan, attorney for the Buice estate, on February 9, 1989. (Exh. Chi-24.) Montgomery sent follow up letters to USF&G on February 24; April 6; April 14; April 19; and May 5, 1989. (Exhs. Chi-25, Chi-26, Chi-27; and Pl.'s Resp. to Summ. J. Mot., Exhs. P, Q, R, S, and T.) Morse responded to the February 9 letter by indicating that the identified policy did not cover the Buice claims. (Pl.'s Resp. to Summ. J. Mot., Exh. W.) Further letters to Montgomery from Morse clarified USF&G's position that coverage did not exist under the policies for the incident and that USF&G had no duty to

defend Knight. (*Id.*, Exhs. X, Z, A, and AA; Exh. Chi-16.) Knight testified that he felt Montgomery would be authorized to give notice to the insurance company of the accident, if the need to notice was there. (Trans., p. 116.)

Young testified that the only coverage afforded by the BAP in effect at the time of the accident was for "Specifically described autos" which means that only the autos described in Item Four of the policy were covered under the policy. (Trans., p. 125.) Young further testified that neither the BAP nor the other policies in effect contained non-owned or hired coverage. (*Id.*) Young identified the form which deleted the truck from Knight's policy, which was marked as Exh. D1-7. (Trans., p. 128.) The effective date of the removal of the truck from Knight's policy was June 1, 1984. (*Id.*)

Young stated that Hunnicutt reported Brock's accident by a phone call to his office. (*Id.*, p. 132.) He stated that neither Knight or Hunnicutt specified whether to report the accident as connected with Knight's business. (*Id.*) Young stated that when the telephone call came to his office reporting the accident, Knight did not instruct Young whether to report the accident on his policy. (*Id.*, p. 148.) Young stated that he made the decision to report the accident to Reliance and not to USF&G or Chicago. (*Id.*, p. 160.) Young stated that he decided since the truck was removed form Knight's policy, it was not covered by Knight's policy. (*Id.*) Young testified that when Hunnicutt called about the accident, she was reporting the accident for Brock to trigger coverage on his individual policy. (*Id.*)

Young prepared an ACORD[7] loss form and sent it to United Pacific[8] in connection with Brock's accident. (*Id.*, p. 133.) young stated that an ACORD notice is the customary way of giving written notice of a loss in the insurance industry. (*Id.*, p. 146.) An ACORD form was not prepared or sent to USF&G until Young received a letter from Floyd Logan, informing him of the claim against Knight. (*Id.*, p. 134.) The ACORD notices sent to USF&G, marked Exhs. D-14 and D-15, were identified as the forms Young filled out to report the incident after Logan's letter was received. (*Id.*, p. 135.) Young testified that an ACORD loss notice was never sent to Williams Marketing. (*Id.*, p. 145.)

Young testified that all of the policies in effect on Knight's operation were kept in one file. (*Id.*, p. 171.) Young indicated that he did not report the accident to Knight's policies because the accident was reported regarding Brock's policy alone, and that neither Knight not Hunnicutt made a claim to his office under Knight's policies. (*Id.*, p. 170.)

After receiving notification of the lawsuit filed against Knight, Young's office contacted Williams Marketing and spoke to a party identified only as "Lena." A

---

[7] An ACORD loss form is the loss notice designed for private industry automobile losses, according to Young's testimony. (Trans., p. 133.)

[8] United Pacific is a wholly owned subsidiary of the Reliance Group.

follow-up memo sent after the conversation stated the following:

> Umbrella coverage only extends the coverage of the primary underlying coverages. If non-owned and hired is not on the primary, the umbrella would not provide this coverage. Need to be sure non-owned and hired is not on the primary.

(*Id.*, p. 208.) Young testified that he did not ask Williams Marketing to make the determination whether non-owned and hired was on the primary policy but relied on his own determination and USF&G's determination of that information. (*Id.*)

Powell, who no longer worked for Young at the time of the trial, testified that the Jackson claims office of USF&G was sent a notice sent to USF&G regarding the accident in April 1988. (*Id.*, p. 226.) USF&G and the plaintiff agree that a copy of the loss notice for Brock's loss was sent to USF&G with Knight's notice. (*Id.*, p. 240.)

Forest Holder, Sr., former claims office supervisor for USF&G, testified that he received notice of the Buice accident in 1988 and determined that no coverage was afforded the Brock vehicle under any of the policies in effect at the time. (*Id.*, p. 246.) He stated that the Brock vehicle was not listed on the trucker's policy, or the BAP. (*Id.*, pp. 246-247.) He stated that the comprehensive general liability policy did not extend coverage to automobiles. (*Id.*, p. 247.) He testified that the endorsement marked as exhibit D1-14[9] did not extend coverage for the

---

[9] This is the JXN-154 policy endorsement.

vehicle because the vehicle was not used solely for business purposes. (*Id.*, p. 248.) Holder testified that USF&G had factual information from their attorney (Morse) that Brock was not on business for Knight at the time of the accident. (*Id.*, p. 259.) Holder testified that he never got a written opinion from Morse regarding whether JXN-154-B extended coverage for the incident under the BAP. (*Id.*, p. 268.) Holder stated that the standard symbol indicting [sic] that non-owned vehicles were covered under the policy was not present in the BAP. (*Id.*, p. 270.)

Darrell Ezell, a claims adjustor for USF&G, testified that he determined that there was no coverage under the policies. (*Id.*, p. 277.) He stated that USF&G had a copy of the investigating officer's report; of Brock's insurance policy; and knowledge of the facts of the manslaughter case along with copies of the three policies at the time USF&G made its coverage determination. (*Id.*) Ezell testified that ordinarily the agent notifies the excess carrier of a claim. (*Id.*, p. 284.)

Ezell stated that the declarations page of the BAP contained a notice that JXN-154-B was an endorsement to the policy. (*Id.*, p. 279.) Ezell indicated that Morse's letter regarding coverage under the policies stated that there was no coverage under the BAP policy because the vehicle was not a specifically described vehicle. (*Id.*, p. 288.) Ezell testified there is a difference between being "solely on business for your employer" and acting in the scope of employment. (*Id.*, p. 298.) Ezell stated that the person's sole purpose must be for business of the employer to secure coverage under JXN-154-B. (*Id.*, p. 298.) He reiterated that he did not receive an opinion to this effect from

Morse or the Jackson office, which authored the endorsement. (*Id.*)

II. History of the Buice Lawsuit

The Buice estate filed a complaint against Knight in August 1987 alleging that Brock was Knight's employee and was acting in the course and scope of his employment at the time of the accident. The complaint also alleged that Brock was intoxicated or under the influence of alcohol at the time of the accident and that Brock's negligence was the cause of Mary Virginia Buice's death.

Two summons were issued to SKSF; one in August 1987, which was served on the Secretary of State, and an alias summons, which was issued and returned in December 1987. Knight appeared at an April 1988 deposition unrepresented by counsel. The Buice estate was allowed to file an amended complaint by an order dated December 8, 1988. The amended complaint added Knight d/b/a SKSF as a party defendant. Young was noticed [sic] of the lawsuit on April 27, 1988, and then notified USF&G of the suit. Morse, retained on behalf of USF&G, filed an answer on behalf of Knight in the lawsuit on August 12, 1988. (Exh. P-6.) The answer admitted Brock's negligence but denied that he was acting in the scope of employment at the time of the accident. (*Id.*, pp. 1-2.) USF&G sent no reservation of rights notice to Knight or Chicago.

Morse filed a Motion for Leave to Withdraw as Counsel for Knight on September 21, 1988. (Exh. P-6.) The motion states that after Morse appeared to afford Knight a defense, USF&G determined that the BAP and Trucker's

policy afforded no coverage on the vehicle involved in the accident. (Mot. to Withdraw, Exh. A, Morse Aff. and Pl.'s Resp. to Summ. J. Mot., Exhs. L and M.) The policies did not list Brock's vehicle as a covered vehicle. (Pl.'s Resp. to Summ. J. Mot., Exh. M.)

Morse met with Knight and informed him that the insurance policies provided no coverage for the incident and told Knight he would have to retain his own attorney. (Trans., pp. 103, 117.) Morse also sent a letter to Knight, dated September 21, 1988, advising him that USF&G "does not insure the above-referenced claim" and informing Knight that a motion to withdraw was filed, should he care to object to the motion. (Exh. D1-26.) Knight was served with an amended complaint in this cause on January 24, 1989. (Exh. D1-2.) Morse was allowed to withdraw as Knight's attorney by court order dated January 23, 1989. (Exh. D1-35.)

The Buice estate filed a motion to strike the answers and for default judgment against Knight on March 28, 1989. (Exh. P-39.) The Court entered a default judgment in the amount of $1,173,591 against SKSF and Knight individually on June 18, 1990. (Exh. D1-3.) The judgment, based on the Magistrate Judge's report and recommendation, found the accident was caused by Brock's negligence and that Brock was in the course and scope of his employment with Knight at the time of the accident. (Exhs. D1-3 and P-8.) A writ of garnishment was issued against USF&G and Chicago on September 26, 1990. There is no evidence that the issue of policy coverage was addressed in report and recommendation or the judgment.

Discussion

This cause comes before the Court as a garnishment action filed September 26, 1990, against USF&G, and Chicago. Garnishment actions are remedies available in federal court pursuant to Rule 64 of the Federal Rules of Civil Procedure. The rule provides in relevant part:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held; * * * . The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Garnishment is primarily a statutory remedy. *See* Miss. Code Ann. § 11-35-1 *et seq.* (1972). The cause is construed as an independent action from the primary action which established the judgment debt. *Butler v. Polk*, 592 F.2d 1293, 1295 (5th Cir. 1979). Therefore, since the underlying lawsuit was clearly within this Court's jurisdiction, and the garnishment action against the insurance companies is not altogether independent of the liability action between Buice and Knight, this Court properly retains jurisdiction to decide this action. *See Moore v. Sentry Ins. Co.*, 399 F.Supp. 929, 931 (S.D.Miss. 1975); *see generally Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1986)

(which allows the action against the insurer on the basis of diversity).

The availability of garnishment is governed by state law; Mississippi recognizes insurance policy proceeds as properly subject to garnishment. *Jones v. Southern Marine & Aviation Underwriters*, 739 F.Supp. 315, 317 (S.D.Miss. 1988), *aff'd* 888 F.2d 358 (5th Cir. 1989). A judgment creditor may suggest any one of the four Mississippi grounds for garnishment to be answered by the garnishee. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934). All persons summoned as a garnishee must answer (1) whether he is indebted to the defendant (2) what effects of the defendant he has or had at the time of the service of the writ, (3) whether he knows or believes that any person is indebted to defendant; and (4) whether he knows or believes that any other person has effects of the defendant. *See Arky v. Cameron*, 92 Miss. 632, 46 So. 54 (1908); Miss. Code Ann. § 11-35-25.

USF&G has complied with these requirements. Their answer to Writ of Garnishment denies liability to Knight, denies possession of any of Knight's effects, and denies knowledge of any person indebted to Knight or having any of his effects. *See Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474 (1932).

Chicago's answers and defenses also comply with the aforementioned requirements. Chicago denies that it is a defendant because Chicago does not possess or control any of Knight's effects; denies being indebted to Knight in any amount; and denies knowledge of any person indebted to Knight or having his possessions or control of such. *Id.* Chicago also avers that Knight failed to give

Chicago proper notice of the underlying claim or the filing of the complaint against Chicago. (Chicago's Answer & Defenses, filed August 22, 1991.) Chicago denies that plaintiffs forwarded notice of the claim itself or any litigation until a default judgment had been entered in the cause. (*Id.*)

I. Estoppel

The Buice estate argues that USF&G is estopped from denying coverage by its prior actions in the defense of this lawsuit. The plaintiffs contend that the insurance companies are estopped from denying coverage under the policies because of the Magistrate Judge's opinion granting the default judgment against Knight which found that Brock was acting in the scope of employment at the time of the accident. The factual basis for the determination that Brock was acting within the scope of employment is unclear. Plaintiffs contend that the Magistrate Judge's decision collaterally estops the current adjudication of the insurers' liability under the policies.

Collateral estoppel prevents the relitigation of issues which were central to a judgment entered in one case in subsequent litigation between the parties. *Harris v. Washington,* 404 U.S. 55 (1971). Unlike *res judicata,* collateral estoppel only applies to issues actually litigated in a prior suit. *Walker v. Kerr-McGee Chem. Corp.,* 793 F.Supp. 688, 694 (N.D.Miss. 1992). Under Mississippi law, the mutuality of parties in the lawsuits is strictly interpreted for the effect of prior state court litigation on the use of collateral estoppel. *Walker,* 793 F.Supp. at 696.

Otherwise stated:

> [t]he essential elements of an equitable estoppel are:
>
> > Conduct and acts, language or silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence.

Chapman v. Chapman, 473 So.2d 467, 470 (Miss. 1985) (citing *Crowe v. Fotiades*, 224 Miss. 422, 80 So.2d 478, 486 (1955)).

This doctrine has also been applied to the conduct of insurers who withdraw their representation of their insureds. In *Hartford Accident & Indem. Co. v. Lockard*, 239 Miss. 644, 124 So.2d 849 (Miss. 1960), the court stated:

> "In order to create an estoppel in pais the party pleading it must have been misled to his injury, or the party pleading it must have been misled to his hurt or prejudice, * * * by the conduct or representations of another on which he relied and by which he was influenced and induced to act, or to refrain from acting, or to change his position; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect." 31 C.J.S. *Estoppel* § 74, p. 276. The general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not

> estopped to do so if its action does not result in any prejudice to the insured. *Southern Farm Bureau Casualty Ins. Co. v. Logan*, 1960, 238 Miss. 580, 119 So.2d 268 (1960).

Lockard, 124 So.2d at 856.

A federal court, sitting in diversity and considering the collateral estoppel effect of a prior federal court judgment will apply federal standards in determining the preclusive effect of a prior judgment on a particular issue to a subsequent diversity action. *Walker*, 793 F.Supp. at 697. Collateral estoppel will apply in a federal diversity case when:

> (1) the issue at stake be identical to the one involved in the prior litigation;
>
> (2) the issue has been actually litigated in the prior litigation; and
>
> (3) the determination of the issue in the prior litigation [has] been a critical and necessary part of the judgment in that earlier action.

Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981). The defense must be pled by the party seeking collateral estoppel and the party raising the defense must define the precise legal issue decided in the prior action. *Nichols v. Anderson*, 788 F.2d 1140, 1141 (5th Cir. 1986). *Res judicata* would bar relitigating the same issues tried and adjudicated in the default judgment. *Law Offices of Moore & Assoc. v. Aetna Ins. Co.*, 902 F.2d 418, 420 (5th Cir. 1990).

There is no evidence that the issue of *res judicata* was raised in the amended complaint, motion for entry of default judgment, or in the suggestion for writ of garnishment. (Exh. D1-1, Am. Compl.; P-39, Mot. to Strike Ans.

and to enter Default Judgment; Suggestion of Writ of Garnishment on Judgment.) The Magistrate Judge determined that Brock was acting in the scope of his employment at the time of the fatal accident. However, the issue of coverage under the insurance policy was not adjudicated in that opinion. In fact, this Court explicitly stated that coverage under the insurance policy was not determined in the adjudication of the default judgment. (Memo. Op. April 25, 1991, pp. 13-14.)

The insurance companies must have had "adequate incentive to litigate in the first case" and if there is any doubt regarding the reliability of the first fact findings, "collateral estoppel should never be applied." *State ex rel. Moore v. Molpus,* 578 So.2d at 643; *M.E.S.C. v. Philadelphia Mun. Separate Sch. Dist.,* 437 So.2d 388, 397 (Miss. 1983).

Furthermore, collateral estoppel applies only when the issues are actually previously *litigated. State Farm Mutual Auto. Ins. Co. v. Universal Underwriters Ins. Co.,* 601 F.Supp. 286, 288 (S.D.Miss. 1984). A default judgment is not a litigation of the issue of coverage for the accident in this case. *See Nichols,* 788 F.2d at 1141; *Restatement (Second) of Judgments* § 27, Comment e (1982).

The Magistrate Judge was not construing or interpreting the USF&G policy at the time of his decision and the policy was not before the Court at the time of the decision. The Court expressly stated that the issue of policy coverage was not considered or determined by the Magistrate Judge in his decision.

An insurer may conduct the defense of a lawsuit against an insured until such time as the insurer discovers noncoverage. Insurance, 44 Am. Jur. 2d § 1423, p.

371. An insurer may be estopped from denying liability under a policy if the insurer's conduct results in prejudice to the insured. *Id.*, § 1428, p. 376. In this case, Knight was informed well in advance of the entry of the default judgment that USF&G was withdrawing from his defense, as the company determined that there was no coverage for the incident in any of the policies in force at the time of the accident. In fact Knight obtained the assistance of another attorney after Morse told Knight that USF&G was withdrawing from the defense of the lawsuit. The unopposed default judgment was entered without testimony.

If an insurer suspects non-liability due to lack of policy coverage, and plans to defend on an issue of non-coverage, it may be construed a breach of duty for the insurer to continue to represent the insured. *See Martin v. Travelers Indem. Co.*, 450 F.2d 542 (5th Cir. 1971). In the instant case, the insurer began representation of the insured until USF&G was able to determined that the policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that USF&G would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to do "whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to USF&G for Knight and appeared at depositions as his attorney. The Court cannot consider that USF&G's actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.

II. Coverage Under the Policy

An insurance policy may limit coverage under any terms the company deems appropriate. In this case, USF&G limited their liability for non-owned automobiles to those used "solely for business purposes." The facts establish that the truck was no longer owned by Knight at the time of the incident and had been endorsed off the Knight policies, effective June 1, 1984. (Exh. D1-7.) Knight sold the truck to Brock approximately one month before the accident, and Brock had obtained coverage for the truck under his personal insurance policy. To determine whether coverage is available under the USF&G policy, the Court must determine whether Brock's use of the non-owned vehicle was solely for business purposes to trigger coverage under the USF&G BAP.

In this case, the Court is called upon to construe a contract for insurance. Interpretation of an insurance contract is a matter of law. *Putnam v. Insurance Co. of N. Am.*, 673 F.Supp. 171, 175 (N.D.Miss. 1987), *aff'd* 845 F.2d 1020 (5th Cir. 1988). The contract language governs the interpretation of the contract if the language is clear and specific. *Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985). Words in a policy must be read in their ordinary sense and must be interpreted according to their plain meaning which a layman would accord them in an ordinary sense. *Mississippi Power & Light v. United Gas Pipeline*, 760 F.2d 618 (5th Cir. 1985).

The Court must look to the policy to determine who is an "insured" under the policy. In this case, the BAP includes the following provision:

> This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages apply only to those **autos** shown as covered **autos. Autos** are shown as covered **autos** for a particular coverage by the entry of one or more to the symbols from **Item THREE** next to the name of the coverage.

(Pls.' Exh. B., p. 4.) (emphasis in original.) The policy included the following statement under "Schedule of coverages and covered autos": Forms and Endorsements contained in this policy at its inception included the following: Jxn. 154-B, 287, CA 9917, 9903, 2128, 9921, 0001, Gen.166. (Pls.' Exh. B., p. 4.)

Liability insurance and uninsured motorists insurance contain the symbol "7". Item Three is the "Description of covered auto designation symbols" section of the policy which describes symbol "7" as follows:

> **SPECIFICALLY DESCRIBED AUTOS.** Only those **autos** described in **Item FOUR** for which a premium charge is shown and for liability coverage any **trailers you** don't own while attached to any power unit described in **Item FOUR.**

(Pls.' Exh. B., p. 5.)

Jxn. 154-B is the endorsements that provides as follows:

> It is agreed that the unqualified word 'insured' wherever it is used in Part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.

> Exceptions: *The following limitation does not apply* with respect to private passenger automobiles, or *to operation of other automobiles while being used solely for business purposes in connection with your business.*

(Jt. Exh. P-1 and D1-7.) (emphasis added.)

CA 9917 provided the following regarding coverage:

> 2. **PERSONAL AUTO COVERAGE**
>
> While any **auto you** own of the **private passenger type** is a covered **auto** under the LIABILITY INSURANCE:
>
> b. Any **auto you** don't own is a covered auto while being used by **you** or by any **family member** except:
>
> (4) Any **auto** other than an **auto** of the private passenger type used by **you** or by any of **your family members** while working in any other business or occupation.

(Jt. Exh. P-1 and D1-7.) (emphasis in original.)

"Business pursuits" generally include activities ordinarily pursued in anticipation of profit. If an insurance policy requires that the vehicle be used for only for business purposes to trigger coverage, courts have found this an enforceable limitation to the extension of coverage. *Utica Mutual Ins. Co. v. D.L. Dunn,* 129 S.E.2d 94 (Ga. 1962); *Hanover Ins. Co. v. Ransom,* 448 A.2d 399 (N.H. 1982); *Royal Globe Ins. Co. v. Fletcher,* 459 A.2d 255 (N.H. 1983); Appleman, *Insurance Law & Practice* (Buckley ed.) § 4326, pp. 472-478. Brock was employed by Knight at SKSF at Port Bienville, Mississippi. (Trans., p. 47.) He was on call 24 hours to guard the Port Bienville premises and

to tie up barges arriving at night. (*Id.*, p. 48.) He stayed on the premises in a trailer made available to him when he stayed to be available to tie up a barge and to guard the premises. (*Id.*, p. 49.) He stated he was paid $8.00 an hour; however, during cross examination Brock stated he received $300.00 per week for payment for services rendered to Knight. (*Id.*, pp. 49, 57-58.)

In a non-jury case, the Court must make findings and fact and credibility determinations. *Crosby-Mississippi Resources v. Florida Gas Transmission Co.*, 815 F.Supp. 977, 980 (S.D.Miss. 1993). The testimony, exclusive of self-serving testimony, establishes that Brock was not using the truck solely for the business purposes of SKSF at the time the accident occurred. Brock was not paid for the time spent traveling to Slidell for the purpose of obtaining his evening meal. *Smith v. Anderson-Tully Co.*, 608 F.Supp. 1143, 1146 (S.D.Miss. 1985), *aff'd* 846 F.2d 751 (5th Cir. 1988). Brock was on a personal mission at the time of the accident, with no connection to his employment. *Bradley v. Holmes*, 248 Miss. 44, 157 So.2d 801, 803 (1963). Traveling to or from work in itself is not enough to establish that the driver was within the scope of his employment invoking liability of his employer for his negligent driving without proof of special circumstances. *Mississippi Power & Light Co. v. Laney*, 247 Miss. 71, 154 So.2d 128, 133 (1963). The determination that an employee is acting within the scope of his employment is generally made using the same factors used in determining whether the employee was in the scope of his employment while driving the company's vehicle. *Mississippi Power*, 154 So.2d at 133 (citing 52 A.L.R.2d at 287-301.) Generally, an employee going and coming from

work is not considered within the scope of his employment. *Id.*, p. 134. Mere returning to the job site after partaking of a meal is not sufficient to establish liability on the part of the employer, without evidence that the employer was no paid an allowance for the use of the car. *Id.*

Brock had worked at Knight's gravel pit operation in Nicholson, Mississippi, during the day of the accident. (*Id.*, p. 50.) Brock went to Port Bienville to collect his pay and at that time, Knight informed Brock that he needed to be at the facility that evening to tie up barges which were expected at the facility. (*Id.*)

Brock informed Knight that he was planning to go to Slidell, Louisiana, to eat. (*Id.*) Brock was told he could leave the job site and return in time to tie up the barge. (*Id.*) Brock went to Slidell, stopped at his friend's home to invite her to eat, then proceeded to the restaurant. (*Id.*, p. 51.) Brock started back to Port Bienville, stopping at the Time Saver store to purchase two beers. (*Id.*) Brock states he was being paid for his activities at the time of the accident. (*Id.*)

As previously stated, Brock was using his personal vehicle at the time the accident happened. (*Id.*, p. 49.) The testimony established that Brock purchased the truck from Knight about two months prior to the accident. (*Id.*, pp. 49, 58.) Knight had transferred title to the vehicle to Brock to enable Brock to obtain financing on the truck. (*Id.*, p. 92.)

Knight testified that Brock stayed at the Port Bienville facilities when he was working. (*Id.*, p. 94.) On cross examination, Knight was questioned about deposition

testimony he gave in 1988 in which he stated there was not a barge expected at the Port Bienville facility on the night of the accident. (*Id.*, pp. 95-96.) Knight stated he made a mistake in the 1988 testimony. (*Id.*, pp. 96-97.)

There is no evidence that Brock was paid for his time travelling to Slidell, or that Brock was acting under Knight's control or specific directions. Brock's "mission" for his employer was to tie up the barges when the barges arrived at the Port Bienville facility. In order to accomplish this "mission" Brock had to reach the facility. The Buice accident occurred before Brock reached Port Bienville. Therefore, there is no evidence that Brock's trip in his private truck was "solely" for business purposes. *Seedkem South, Inc. v. Lee*, 391 So.2d 990 (Miss. 1980); *see Luther McGill, Inc. v. Cook*, 306 So.2d 304, 306 (Miss. 1975); *Price v. Colony Ins. Co.*, 520 So.2d 964, 966-67 (La. 1987), *writ denied* 522 So.2d 561. The Court has been unable to find cases wherein an employee travelling on a personal mission is found acting for the business purposes of his employer. *See S. & W. Constr. Co. v. Bugge*, 194 Miss. 822, 13 So.2d 645 (Miss. 1943); *Beard v. Seamon*, 175 So.2d 671 (La. 1965); *Fidelity & Casualty Co. of N.Y. v. Carpenter*, 234 F.2d 528 (5th Cir. 1956) (La. law); *Barr v. Colorado Interstate Gas Co.*, 217 F.2d 85 (5th Cir. 1954) (Tx. law); *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982 (5th Cir. 1981) (Tx. law). The Court concludes there was no coverage for the incident under Knight's insurance policies.

The default judgment, entered a year and eight months after USF&G's withdrawal, was rendered without opposition to the assertions that Brock was acting "within the scope of his employment" at the time of the accident. (Trans., p. 382; Chi-38, p. 2.) Generally, denial of liability

is estopped when the insurer withdraws from the defense of the insured, if the insurer's conduct results in prejudice to the insured. *Southern Farm Bureau Casualty Ins. Co. v. Logan,* 238 Miss. 580, 119 So.2d 268 (1960). Knight went to another attorney after USF&G withdrew from his defense. Neither Knight nor the attorney appeared on Knight's behalf when the default judgment was entered. This unfortunate turn of events cannot, however, be attributed to USF&G's withdrawal. *But see Pacific Indem. Co. v. Acel Delivery Serv., Inc* , 485 F.2d 1169 (5th Cir. 1973), *cert. denied* 415 U.S. 921 (1974).

The Mississippi Supreme Court has indicated that the doctrine of waiver cannot extend contract coverage where coverage does not exist. *See Lockard,* 124 So.2d at 854 (citing *Carnes & Co. v. Employers' Liab. Assurance Corp.,* 101 F.2d 739 (5th Cir. 1939)). The language of the policy clearly provides coverage if the non-owned automobile is used "solely for business purposes." If an insurance contract is written in unambiguous language, the contract is construed as written. *Ford v. Lamar Life Ins. Co.,* 513 So.2d 880, 886 (Miss. 1987).

Brock was not using his truck "solely" for Knight's business. The original complaint filed in this action alleged that Brock was the cause of the accident. It was not until the amended complaint was filed on December 27, 1988, that Knight was accused of letting Brock use the truck in the scope of his employment. In response to plaintiff's motion to amend, USF&G had renewed its motion to withdraw on December 7, 1988. The Court entered an order relieving Morse as attorney of record in this case on January 23, 1989.

USF&G undertook Knight's defense at the outset of the case as coverage was questionable and withdrew immediately upon discovering that coverage did not extend to the vehicle or driver involved in the fatal accident. USF&G's behavior was appropriate under the circumstances. *See Fidelity & Casualty Co. of N.Y. v. Riley,* 380 F.2d 153, 157 (5th Cir. 1967) (citing cases).

III. Chicago's Liability

Chicago's answer to the writ of garnishment included a denial of indebtedness to Knight, denial of having any effects of the defendant in its control, denial of knowledge of any persons indebted to Knight or of any other persons who have any effects of the defendant in their control. (Ans. and Defenses of Chicago Insurance Co.) Chicago also asserted that they received no notice of the claim until after the default was entered, with notice allegedly being a condition precedent to their liability under the policy. Chicago also denied coverage under the policy for the claim and asserts that if liability is established, their portion of liability is only the excess of the underlying insurance.

Chicago's named insured was not a party to this action until December 27, 1988, when the Buice estate filed its amended complaint naming Steve Knight, Jr. d/b/a Steve Knight Steel Fabricators. (Exh. Chi-3.) Chicago's insurance policy provided that the underlying coverage was provided by USF&G. (Exh. P-4. p. 2.) The policy also provides in pertinent part as follows:

III. Definition of Insured, Named Insured

The "named insured" means the person or organization named in the declarations and includes any subsidiary thereof and any other organization coming under the named insured's control or which it assumes active management.

The unqualified word "insured" includes the named insured and also includes:

(b) except with respect to the ownership, maintenance or use, including loading or unloading, or automobiles wile [sic] away from premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, (1) any employee of the named insured while acting within the scope of his duties as such; or (2) any person or organization acting as agent with respect to real estate management for the named insured;

(Exh. P-4, p. 8.)

The Buice accident did not happen on Knight's premises. Furthermore, the Court has found that Brock was not acting for "business purposes" at the time of the accident. Therefore, the Court finds that there was no coverage for the incident within Chicago's policy. Therefore, there is no cause to issue a writ of garnishment against Chicago in this circumstance.

In absence of information supporting coverage under the policy provisions for the accident underlying this lawsuit, the Court finds that USF&G and Chicago do not hold any of the judgment debtor's property and releases USF&G and Chicago from the writ of garnishment issued in this case.

Conclusion

For the reasons discussed herein, the Court finds that the accepted facts and law support the release of USF&G and Chicago from the writ of garnishment issued in the instant case.

Counsel for USF&G shall submit an order in conformity with and incorporating by reference the foregoing Memorandum Opinion within ten (10) days of the date of entry hereof. Each party shall bear their/its own costs.

DATED this the 20th day of April, A. D., 1994.

/s/ Walter Gex III
UNITED STATES DISTRICT JUDGE

WHITE & MORSE
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 1209 – ONE HANCOCK PLAZA
GULFPORT, MISSISSIPPI 39501
601/863-9821

[Names and addresses omitted in printing]

July 15, 1988

Mr. D. N. Ezell
USF&G
P. O. Drawer 1540
Gulfport, MS 39502

Re: *Buice v. Steve Knight and Steel Fabricators*

Dear Darwin:

This will acknowledge receipt of your file in the above captioned case. We reviewed the file and have endeavored to ascertain whether or not the insured is still in bankruptcy. Bill Boyd, one of my partners, has represented a lender who loaned money to the corporation. The file indicates that the corporation filed bankruptcy in the United States District Court in Biloxi, Case No., 85-07797SC. However, this bankruptcy was dismissed on February 8, 1988; therefore, the automatic stay against your insured afforded by the bankruptcy law is not applicable. Boyd's file indicates that the insured is insolvent, is no longer operating and is so uncooperative that his bankruptcy attorney was permitted to withdraw as his counsel. The most current address in Boyd's file of Steve Knight is Rt. 5, Box 699, Picayune, Mississippi. If he is no more responsive in the handling of the above referenced case than he was in his own bankruptcy, we will have a

difficult time defending this case. It may be that the insured's failure to notify the insurer and lack of cooperation in the defense of this case will result in discharge of your obligations to the Defendant or indemnify the insured.

Pursuant to your instructions, we have filed a Motion for additional time to answer.

I appreciate your forwarding this matter to us.

Sincerely yours,

WHITE & MORSE

Stanford E. Morse, Jr.

SEM/KJW

WHITE & MORSE
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 1209 – ONE HANCOCK PLAZA
GULFPORT, MISSISSIPPI 39501
601/863-9821

[Names and addresses omitted in printing]

August 12, 1988

Mr. Steve Knight, Jr.
Route 5, Box 699
Picayune, MS

CERTIFIED

Re: *Estate of Buice v. Steve Knight, Jr. Steel Fabricators, Inc.*

Dear Mr. Knight:

USF&G has employed us to defend the above referenced case on your behalf. Its policy of insurance requires the insured to cooperate and assist the insurer in the defense of this case. Your failure to do so may result in no obligation to defend the case and to indemnify you for any judgment rendered by the Court within the limits of liability of the policy.

Our review of the file indicates that it is highly unlikely that Gary Brock was on any mission for your company at the time of the accident. However, this defense has to be proven and your assistance is absolutely essential.

Please contact me on receipt of this letter so that I may discuss this matter with you.

Sincerely yours,

WHITE & MORSE

/s/ Standford E. Morse, Jr.
Standford E. Morse, Jr.

SEM/kjw
cc: D.N. Ezell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED, WILLIAM RAMSEY BUICE, ADMINISTRATOR — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0517(G)

STEVE KNIGHT, JR., STEEL FABRICATORS, INC., and TIME SAVER STORES, INC. — DEFENDANTS

MOTION TO WITHDRAW AS COUNSEL FOR STEVE KNIGHT, JR., STEEL FABRICATORS, INC.

COMES NOW Stanford E. Morse, Jr. of the firm of White & Morse, Gulfport, Mississippi, and moves the Court for order permitting the undersigned to withdraw as counsel for Defendant Steve Knight, Jr., Steel fabricators, Inc., and in support of such Motion would show as follows:

I.

Affidavit of Stanford E. Morse, Jr. attached hereto and incorporated herein by reference and designated Exhibit "A" hereto establishes that the undersigned was employed by USF&G Claims Office, Gulfport, Mississippi to afford a defense to Steve Knight, Jr., Steel Fabricators, Inc. (Steve Knight), and that subsequent to entry of appearance of such counsel it was determined by USF&G that it had no coverage upon the vehicle involved in such accident and that such counsel has been instructed to withdraw as counsel for Steve Knight.

WHEREFORE, counsel prays that this Court will enter on Order permitting counsel to withdraw as attorney for such Defendant.

Respectfully submitted,

BY: WHITE & MORSE

BY: /s/ Stanford E. Morse, Jr.
STANFORD E. MORSE, JR.

WHITE & MORSE
ATTORNEYS AT LAW
SUITE 1209 – ONE HANCOCK PLAZA
POST OFFICE DRAWER 100
GULFPORT, MS 39502
(601) 863-9821

CERTIFICATE OF SERVICE

I, Stanford E. Morse, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of Motion to Withdraw as Counsel for Steve Knight, Jr., Steel Fabricators, Inc. to Floyd J. Logan, P. O. Box 1508, Gulfport, MS 39502-1508; and to D. Mitchell McCranie, P. O. Box 130, Gulfport, MS 39502.

THIS the 21st day of September, 1988.

/s/ Stanford E. Morse, Jr.
STANFORD E. MORSE, JR.

EXHIBIT "A"

STATE OF MISSISSIPPI

COUNTY OF HARRISON

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, the undersigned authority, Stanford E. Morse, Jr., who first being duly sworn on oath states as follows:

1. Affiant is attorney for Steve Knight, Jr., Steel Fabricators, Inc. (Steve Knight).

2. Affiant was assigned this file by D. N. Ezell, USF&G Claims Office, Security Building, Gulfport, Mississippi on or about July 13, 1988. At such time Affiant was requested to file a Motion for Time to answer on behalf of Steve Night which Affiant did on or about July 14, 1988.

3. On or about August 12, 1988, Affiant filed an answer to the Complaint and Interrogatories to the Plaintiff. On the same date, Affiant wrote Steve Knight, Jr. advising him that USF&G had employed Affiant to defend this case and requested Steve Knight, Jr. to contact Affiant. Such letter was delivered to Steve Knight, Jr. by certified mail and was acknowledged by E. Ritchie on August 22, 1988.

4. On or about August 16, 1988, Affiant joined in a joint Motion to a scheduling order prepared by Floyd Logan, attorney for Plaintiff.

5. On or about August 22, 1988, Affiant received a letter from D. N. Ezell advising Affiant that the insurance

afforded Steve Knight by USF&G did not cover the vehicle involved in such accident. Affiant was requested to review specimen copies of a trucker's policy and business auto policy issued by USF&G, which Affiant did and concurred with D. N. Ezell's opinion that such policies did not insure the vehicle involved in the accident, nor did such policies require USF&G to afford a defense to Steve Knight.

6. On August 23, 1988, Mr. Steve Knight came to Affiant's office and Affiant gave to Mr. Knight a copy of the letter from Mr. Ezell which is incorporated in this affidavit and designated Exhibit "A." Affiant telephoned Mr. Knight's agent, Mr. Burt Young, in Crystal Springs, Mississippi, who acknowledged that the only policies that he was aware of were the policies identified in the letter of Mr. Ezel, Exhibit "A" to this Affidavit. Mr. Young was requested to advise Affiant whether there might have been other insurance. Mr. Young has not confirmed that there is any other insurance.

7. Affiant has been instructed by USF&G to withdraw as counsel for Steve Knight.

Further Affiant sayeth not.

/s/ Stanford E. Morse, Jr.
STANFORD E. MORSE, JR.

SWORN TO AND SUBSCRIBED before me this the ___ day of September, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

EXHIBIT "A"

[LOGO]

UNITED STATES FIDELITY
AND GUARANTY COMPANY
MISSISSIPPI COAST CLAIM OFFICE
P.O. DRAWER 1540
SECURITY BUILDING - SUITE 408,
GULFPORT, MISS. 39501
TELEPHONE 601/863-2710

August 18, 1988

Honorable Stanford E. Morse, Jr.
Attorney at Law
P. O. Drawer 100
Gulfport, MS 39501

RE: 4404 AJ 020210-00-0 – Steve Knight Steel Fabricators
Mary Buice – 7/6/84

Dear Stanford:

I am attaching a specimen copy of Truckers Policy which is one of the policys that was inforced for Steve Knight Steel Fabricators at the time the above loss occurred.

As you will note on the Truckers Policy TP026084300, the face of the policy indicates covered autos with a symbol 46. In reading the description of covered autos dedesignation symbols 46, describes insured's specifically described autos.

Also, coverage section under the policy, page 2 of 6, part for liability insurance. Section two states that we have no duty to defend suits for bodily injury of property damage not covered by this policy. In moving to the DAP Policy which we had for this insured also, it shows symbol

seven, which is specifically described autos and on page 2 of 5 under that speciman policy, duties to defend reads the same.

Forrest and I have reviewed this and are sending you speciman copies of the coverage and it would appear that we may not even owe this insured a defense under this suit since both policys insures specifically described vehicles and the vehicle in question operated by Gary Brock, was not a specifically described vehicle under the insured's policy.

After you have had an opportunity to review this matter, please advise me as to your feelings on this subject matter.

Yours very truly,

/s/ D. N. Ezell
D. N. Ezell
Adjuster

DNE/cp

WHITE & MORSE
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 1209 - ONE HANCOCK PLAZA
GULFPORT, MISSISSIPPI 39501
601/863-9821

[Names and addresses omitted in printing]

November 11, 1988

Mr. D. N. Ezell
USF&G
P. O. Drawer 1540
Gulfport, MS 39502

Re: *Buice v. Steve Knight*

Dear Darwin:

This will acknowledge receipt of your letter of November 9 with enclosures. The declaration page does not show a charge for premiums for comprehensive automobile liability insurance or automobile medical or uninsured motorist coverage. It does not appear that this policy covered any claims arising out of the ownership, operation and use of the vehicle which was involved in the accident.

To be absolutely sure that we are not at risk for a bad faith claim I would like to get confirmation from your agent in Crystal Springs that there was no automobile insurance covering this vehicle. Floyd Logan, who presents the Plaintiffs in this case, told me that Burt Young told him that there was such coverage. I would like to

have it in writing from Mr. Young that there is no coverage.

Sincerely yours,

WHITE & MORSE

/s/ Stanford E. Morse, Jr.
Stanford E. Morse, Jr.

SEM/kjw

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE,
DECEASED, WILLIAM RAMSEY BUICE, PLAINTIFF
ADMINISTRATOR

VERSUS CIVIL ACTION NO. S87-0517(G)

STEVE KNIGHT, JR., STEEL
FABRICATORS, INC., and
TIME SAVER STORES, INC. DEFENDANTS

RESPONSE TO MOTION OF
PLAINTIFF FOR LEAVE TO AMEND

COMES NOW Stanford E. Morse, Jr., counsel of record for Steve Knight, Jr., Steel Fabricators, Inc., and responding to Plaintiff's Motion to Amend would show as follows:

I.

The undersigned counsel has renewed and renoticed his Motion to Withdraw as counsel for Steve Knight, Jr., Steel Fabricators, Inc.

II.

Under the circumstances, the grounds for leave to amend complaint cannot be responded to by such counsel.

Respectfully submitted,

/s/ Stanford E. Morse, Jr.
STANFORD E. MORSE, JR.

WHITE & MORSE
ATTORNEYS AT LAW
SUITE 1209 – ONE HANCOCK PLAZA
POST OFFICE DRAWER 100
GULFPORT, MS 39502
(601) 863-9821

CERTIFICATE OF SERVICE

I, Stanford E. Morse, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of Response to Motion of Plaintiff For Leave to Amend to the following:

Mr. Floyd J. Logan
Attorney at Law
P. O. Box 1508
Gulfport, MS 39502

Mr. D. Mitchell McCranie
Eaton and Cottrell, P.A.
Post Office Drawer 130
Gulfport, MS 39502

THIS the 5th day of December, 1988.

/s/ Stanford E. Morse, Jr.
STANFORD E. MORSE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE,
DECEASED WILLIAM RAMSAY BUICE,
ADMINISTRATOR — Plaintiffs

v. — Civil Action Number: S87-0517(G)

STEVE KNIGHT JR., ET AL. — Defendants

Consolidated with

STEVE KNIGHT, JR. d/b/a
STEVE KNIGHT STEEL FABRICATORS — Plaintiff

v. — Civil Action Number: S91-0352(G)

UNITED STATES FIDELITY AND
GUARANTY COMPANY and CHICAGO
INSURANCE COMPANY — Defendants

AFFIDAVIT OF STEVE KNIGHT, JR.

I, Steve Knight, Jr., being duly sworn, do hereby state under oath:

My name is Steve Knight, and I am one the Defendants in Cause Number S87-0517(G) and the Plaintiff in Cause Number S91-0352(G).

In July of 1984, I had multiple polices [sic] of insurance with Defendants, United Sstates [sic] Fidelity and Guaranty Company (USF&G) and Chicago Insurance Company (Chicago). I was owner of Steve Knight Steel Fabricators, a multi-dimensional hard-labor, small business, which included steel fabrication, barge and ship repair, and sand and gravel hauling and production. The companies contracting for services with me (Lykes Bros. Steamship

Company, Avondale Shipyard, etc.) required me to carry extensive insurance coverage for the mutual protection of all parties. When it came to acquiring that coverage, I looked to Burt Young (Crystal Springs Insurance Agency), a life-long friend. Burt Young and I had grown up together in Crystal Springs and played high school football together. I knew nothing about my policies except that I had full coverage up to one million dollars, and I depended upon the insurance agency, its staff, and Burt Young to write the necessary coverages and furnish the insurance certificates necessary for me to engage in business and to protect me in case I was sued.

Throughout my relationship with Burt Young, which extended over many years, I entrusted my office staff to coordinate the necessary coverages with Burt Young and his staff, and he and I did little of the insurance business ourselves. I estimate that through the years I paid $75,000 to $100,000 in insurance premiums to Crystal Springs Insurance Agency.

On or before June 1, 1984, my employee, Gary Brock, purchased a 1979 Chevrolet 1/2 ton pick-up truck from Steve Knight Steel Fabricators. My office staff and I assisted Gary Brock in obtaining financing for this truck with a bank in Slidell, Louisiana, as well as insurance coverage with Burt Young and Crystal Springs Insurance Agency. In connection with this transfer, my bookkeeper notified Crystal Springs Insurance Agency that the truck had been sold to Brock.

Gary Brock was a salaried employee, whose duties were not limited to the normal 40 hour / 5 day work week but rather, required him to be available seven days

a week at times. He, as well as other employees, was required to live on the job site in a rent-free mobile home at Port Bienville, near Pearlington, Mississippi, and to be on call twenty-four hours a day on occasion in order to be available to assist Lykes Steamship Company in tying up its barges brought to my shipyard for repair.

It was in this capacity that Gary Brock was returning to Port Bienville on July 6, 1984, when he collided with Mary Virginia Buice, fatally injuring her. On July 9, 1984, my staff, contacted Crystal Springs Insurance Agency and Burt Young and reported the loss.

Shortly thereafter, a bank foreclosed on my business and took possession of my business premises and records, and I did not know where my policies were. Subsequently, I filed bankruptcy to try to protect my assets.

Suit was filed by the Buice Estate, and I was notified on August 12, 1988 that an attorney, Stanford Morse, was employed to represent me and to defend my position. In fact, Mr. Morse assured me by certified letter dated August 12, 1988, that I was represented. Stanford Morse filed an answer on my behalf, admitting that Gary Brock was negligent. After I got the letter, I called him, and he asked me to meet with him in Gulfport. I did, and he advised that the vehicle in question was not a described vehicle, and therefore, I might not have coverage. He did not ask me anything about the facts of the case and/or Brock's employment or duties.

After this meeting, neither Morse nor USF&G contacted me any more until I was advised on September 21, 1988, by certified letter, that Morse was withdrawing as

my counsel. I did not hear from him or USF&G again until after he withdrew on January 23, 1989, and I was left as a defendant in a two million dollar Federal Court lawsuit set for trial on April 19, 1989, without an attorney and with an Answer on file which, in effect, admitted liability, even though I thought I was clearly entitled to the coverage I thought I had purchased.

I was frustrated, abandoned, and unable to determine the exact nature of my coverage, since I thought I had full coverage under USF&G's policies and did not understand that I was owed a first dollar duty of defense by my excess carrier, Chicago Insurance Company. I thought Crystal Springs Insurance Company would take care of handling notifying my insurance carriers, since all policies had come through them, and I knew I had several different policies, even though I couldn't find them. In fact, not being able to find my policies, I wasn't aware of any company other than USF&G, although Burt Young had advised to purchase umbrella coverage with another company, since it was available. Obviously, I did not know Chicago had not been placed on notice of this claim by Crystal Springs Insurance Agency, USF&G, Morse, or the broker, Williams Marketing. I did know I was facing financial ruin.

To that point, the only reason Stanford Morse and USF&G ever gave to me for its failure to defend was that the vehicle involved in the accident had been removed from my insurance policy several weeks before the collision, when the truck was transferred to Gary Brock.

After Morse withdrew as counsel, on January 24, 1989, I was served with an Amended Complaint, and I

consulted with attorney, Joseph Montgomery, who wrote letters to USF&G, Burt Young, Crystal Springs Insurance Agency, and Attorney Morse demanding copies of my policies, defense of the wrongful death action, payment to the limits of the insurance coverage of any judgment rendered against me, and offering full cooperation. This correspondence was completely ignored.

On June 18, 1990, a default judgment was entered against me in the amount of 1.2 million dollars.

Under this intense stress, I suffered a heart attack. Although I was lucky to survive, my medical expenses were large, and I had to curtail my work activities and suffered a loss of wages. Even today, I struggle with the limiting factors resulting from my heart attack. I am now totally disabled from my heart attack and other conditions.

Further the affiant sayeth not.

This the 25th day of November, 1992.

/s/ Steve Knight, Jr.
Steve Knight, Jr.

Sworn to and subscribed before me this the 25th day of November, 1992.

/s/ Illegible J. Meyer
Notary Public

My Commission Expires:

My Commission Expires Aug. 25, 1994

WHITE & MORSE
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 1209 – ONE HANCOCK PLAZA
GULFPORT, MISSISSIPPI 39501
601/863-9821

[Names and addresses omitted in printing]

April 20, 1989

Mr. Joe H. Montgomery
Williams, Williams &
Montgomery, P.A.
Post Office Box 113
Poplarville, MS 39470

CERTIFIED

Re: *Buice v. Knight, et al*

Dear Joe:

My letter of April 7th as intended to convey to you and your client that if it was determined that USF&G owed your client a defense with a reservation of rights that I would recommend that USF&G pay reasonably [sic] attorney's fees to the attorney selected by Mr. Knight. This is in line with recent pronouncements of the Mississippi Supreme Court, and is a policy USF&G has followed in at least two other cases I am handling. The last sentence of the first paragraph of my April 7th letter should be read in context with the preceding sentence. The letter of April 17, 1989 was intended to make it quite clear that USF&G would not pay attorney's fees if it determined that it did not owe a defense to your client.

I am enclosing copies of policies of insurance which were given us by our client and covering Steve Knight. The first policy, No. TP026084300 is a trucker's policy and

insures vehicles described in the policy. The vehicle involved in the accident was removed from this policy by an endorsement, a copy of which I am enclosing. The second policy which I have been furnished is the comprehensive general liability policy to which you have been referring in your correspondence. I am enclosing copy of this policy, No. ICC025165294 which was a renewal of the former policy. This policy does not cover automobile liability claims. The information which has been furnished to USF&G indicates that the accident occurred on Highway 90, 2 miles east of Pearlington and did not occur on the premises. Since the accident arose out of the operation, maintenance and use of a motor vehicle which was not insured by USF&G under its trucker's policy and did not occur on the premises which was covered by the comprehensive general liability policy, USF&G has taken the position that the accident is not covered by either policy. In addition, since the accident arose out of the ownership, maintenance, operation and use of an automobile which is excluded under the comprehensive policy, it is the view of USF&G that it is not covered.

Mr. Forrest Holder, resident agent in charge of USF&G's Claims Office in Gulfport, is out of the office until May 1. I have forwarded to his office a copy of the Amended Complaint and correspondence between us for his review and comments. I obviously will not have a definitive response until he has returned to his office and reviewed the relevant documents. I again call on your [sic] as attorney for Steve Knight to protect Mr. Knight's

interests in the case of *Buice v. Steve Knight, et al,* Civil Action No. S87-0517(G).

Sincerely yours,

WHITE & MORES

/s/ Stanford E. Morse, Jr.
Stanford E. Morse, Jr.

SEM/kjw
Enclosures
cc: Darwin Ezell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED WILLIAM RAMSAY KNIGHT, ADMINISTRATOR, Plaintiffs, VERSUS STEVE KNIGHT, JR., et al., Defendants.	)	CIVIL ACTION NO. S87-0517(G)
STEVE KNIGHT, JR., d/b/a STEVE KNIGHT STEEL FABRICATORS, Plaintiff, VERSUS UNITED STATES FIDELITY AND GUARANTY COMPANY and CHICAGO INSURANCE COMPANY, Defendants.	)	CIVIL ACTION NO. S91-0352(G)

DEPOSITION

OF

DARWIN EZELL

Taken on behalf of Steve Knight, d/b/a
Steve Knight Steel Fabricators
1:20 p.m., Thursday, August 13th, 1992

Before
Lynn Strickler, CSR
COAST-WIDE REPORTERS
Court Reporters
Post Office Fox 95
Biloxi, Mississippi 39533-0095
(601) 374-5066 (601) 875-8091

* * *

[p. 55] Q. Okay. And I read your statement to say even though that is true –

A. Yeah.

Q. – "it is alleged in the suit that the driver, Gary Brock, was on business for the insured at the time this loss occurred."

A. Uh-huh (indicating yes).

Q. Why did you say that?

A. Well, if he was solely on business for the insured at the time, then it's possible that his vehicle might have been covered under this policy.

Q. What provisions of the policy would it have been covered under?

A. Under your Business Auto Policy.

Q. If I hand you a copy of that Business Auto Policy, can you point that out to me?

A. If you've got all the endorsements and things in it.

Q. All right, sir. Let me show you what was marked, Mr. Ezell, as Exhibit Number 8 to the deposition

of Percy Burt Young on October 24th, 1989, and ask you if that is a copy of the Business Auto Policy covering Steve Knight in this case?

A. Yes, it appears to be.

Q. Go ahead and examine the entire exhibit, if you [p. 56] would, please.

A. (Witness complies.)

Q. Have you had an opportunity to review that exhibit?

A. Uh-huh (indicating yes).

Q. Have you found the endorsement which you were talking about earlier?

A. Yes.

Q. What is the number of that endorsement?

A. It appears to be a Jackson 154-B, General 166. I can't see down into the binder of the book there.

Q. And you say that this language, "it is alleged in the suit that the driver, Gary Brock, was on business for the insured at the time this loss occurred," could possibly trigger some coverage under that endorsement?

A. Could possibly.

Q. And you were aware of that when you wrote it on August the 15th of 1988?

A. When I wrote what, the memo?

Q. Yes, sir.

A. Uh-huh (indicating yes).

Q. You have to answer out loud.

A. Yes.

Q. Thank you.

MR. DENTON: What's the page number of the memo,

* * *

[p. 60] (Whereupon, there was a short break.)

BY MR. LOGAN:

Q. Mr. Ezell, you have apparently located a document in the original of the claims file?

A. Right.

Q. Do you have a letter of transmittal wherein the date of receipt of that document can be identified?

A. 4/27/88.

Q. And from whom did you receive that?

A. Nelson Benson, USF&G claims, Jackson.

Q. How soon after April the 27th, 1988, did you determine that there was a coverage question under the Business Auto Policy endorsement, Jackson 154-B?

A. When the allegations of the complaint were apparently read alleging that he was an employee of the insured at the time this occurred.

Q. You knew that as soon as you read that allegation in the complaint?

A. Right.

Q. That there was a coverage question there?

A. (Nodding head affirmatively).

Q. All right, sir.

A. Yes.

Q. And I think as the testimony has already indicated, there came a point in time when you authorized

* * *

No. 95-1229

Supreme Court, U.S.
FILED
MAR 4 1996

In The

Supreme Court of the United States

October Term, 1995

STEVE KNIGHT, JR., d/b/a STEVE KNIGHT, STEEL FABRICATORS AND STEVE MARK KNIGHT, AS THE ADMINISTRATOR OF THE ESTATE OF WILLIE STEVE KNIGHT, JR.,

Petitioners,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RAYMOND L. BROWN
Counsel of Record
A. KELLY SESSOMS
BROWN, WATT & BUCHANAN, P.A.
Attorneys for Respondent
3112 Canty Street
P.O. Box 2220
Pascagoula, Mississippi 39569-2220
(601) 762-0035

8421
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether an insurance company acted reasonably in withdrawing a defense for its insured when it was clear that the vehicle involved in the underlying accident was not covered under any of the insured's policies.

2. Whether this Court should disturb the Court of Appeals' affirmance of the District Court's grant of summary judgment to an insurance company on an insured's claims for punitive and extracontractual damages when both lower courts found as a matter of law that the insurer had not only an "arguable reason" to deny the claim, but also that there was no duty to defend.

LIST OF PARTIES

Steve Knight	Plaintiff/Appellant Plaintiff/Appellant #94-60861* Plaintiff/Appellee #95-00029
William L. Denton	Attorney for Knight
Joseph H. Montgomery	Attorney for Knight
Bragg E. Williams, III	Attorney for Knight
Rev. William Buice	Plaintiff/Appellant #94-60384
Logan & Bise	Attorneys for Buice #94-60384
John Genin	Attorneys for Buice #94-60384
United States Fidelity and Guaranty Company	Defendant/Appellee Garnishee Defendant/Appellee #94-60384 Defendant/Appellee #94-60861
Brown, Watt & Buchanan, P.A.	Attorneys for U.S.F. & G.
Chicago Insurance Company	Garnishee Defendant/Appellee #94-60384 Defendant/Appellant #95-00029
Butler, Snow, O'Mara, Stevens & Cannada	Attorneys For Chicago Insurance Company

Pursuant to Supreme Court Rule 29(6), United States Fidelity and Guaranty Company's parent company is United States Fidelity and Guaranty Corporation and its non-wholly owned subsidiaries are as follows:

1. Ballston U.S.F. & G. Holding Company, Inc.; and

2. TNP Office, Inc.

---

* Denotes United States Court of Appeals For The Fifth Circuit docket number.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of the Case	1
Reasons for Denying the Writ	8
I. There are no compelling reasons for this Court to review the Fifth Circuit's ruling based upon well-settled principles of Mississippi insurance law.	8
II. Fifth Circuit properly analyzed Knight's claims under Fed. R. Civ. P. 56.	9
III. In the absence of coverage, U.S.F. & G. had no duty to defend.	10
IV. Knight suffered no prejudice as a result of U.S.F. & G.'s actions.	13
V. Arguable reason precludes punitive damages.	15
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9, 10

Dunn v. State Farm Fire & Casualty Co., 927 F.2d 869 (5th Cir. 1991) 15

Employers Reinsurance v. Martin, Gordon & Jones, 767 F. Supp. 1355 (S.D. Miss. 1991) 15

First Southern Ins. Co. v. Jim Lynch Ent. Inc., 932 F.2d 717 (8th Cir. 1991) 10

Guy v. Commonwealth Life Ins. Co., 894 F.2d 1407 (5th Cir. 1990) 15

Hans Const. Co. v. Phoenix Assur. Co., 995 F.2d 53 (5th Cir. 1993) 10

Jones v. Southern Marine & Aviation Underwriters, 888 F.2d 358 (5th Cir. 1989) 12

Lewis v. Equity Nat. Life Ins. Co., 637 So. 2d 183 (Miss. 1994) 10, 15

Merchants Co. v. American Motorists Ins., 794 F. Supp. 611 (S.D. Miss. 1992) 12

Nationwide Mutual Fire Ins. Co. v. Dungan, 634 F. Supp. 674 (S.D. Miss. 1986) 16

Contents

	Page
New Hampshire Ins. Co. v. Vardaman, 838 F. Supp. 1132 (N.D. Miss. 1993)	12
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	8
Pierson v. Ray, 386 U.S. 547 (1967)	8
Snug Harbor, Ltd. v. Zurich Ins., 968 F.2d 538 (5th Cir. 1992)	12
Statutes Cited:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	1
Rules Cited:	
Federal Rule of Civil Procedure 56	9, 16
Supreme Court Rule 10	9

OPINIONS BELOW

Petitioner, Steve Knight, Jr., d/b/a Steve Knight Steel Fabricators and Steve Mark Knight as the Administrator of the Estate of Willie Steve Knight, Jr. (hereinafter "Knight"), brought the present bad faith suit in the United States District Court for the Southern District of Mississippi under 28 U.S.C. § 1332. On November 30, 1994, the District Court granted Respondent, United States Fidelity and Guaranty Company (hereinafter "U.S.F. & G."), summary judgment based upon Mississippi insurance law.

The United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the District Court's ruling. Knight moved for a rehearing of this judgment which was denied on November 2, 1995. Knight has sought review of the Fifth Circuit's judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On or about August 1, 1991, Knight filed the present bad faith action against his primary carrier, U.S.F. & G., and Chicago Insurance Company (hereinafter "Chicago"), his excess carrier, for tortious breach of contract and bad faith breach of duty to defend. (R. 1-6.) Knight sought punitive damages for U.S.F. & G.'s alleged failure to defend Knight in the underlying wrongful death action filed by the Estate of Mary Virginia Buice. The *Buice* complaint alleged that Gary Brock, an employee of Knight, pursuant to the course and scope of his employment by Knight, struck and killed Ms. Buice on July 6, 1984.

U.S.F. & G. issued five policies to Knight's business, three of which were in force during November 11, 1983, to November 10, 1984: a business auto policy, No. BAP1401146688; a trucker's policy, No. 026084300; and a general liability policy,

No. 025165294. (R. 830.) Burt Young, of the Crystal Springs Insurance Agency, an authorized U.S.F. & G. agency, was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies of Knight's business. (R. 830.)

On the night of the accident, Brock was driving his own personal pickup truck. Brock had purchased the pickup truck from Knight about two months prior to the accident. (R. 871.) Knight had transferred title of the pickup to Brock to enable Brock to obtain financing on the vehicle. (R. 871-72.) The truck was removed by endorsements from Knight's business auto policy on June 1, 1984, over a month before the accident. (R. 872.) Brock had obtained his own liability insurance policy on the pickup with Reliance Insurance. The policy limits on the Reliance coverage were subsequently paid to the Buice estate. (R. 872.)

On the day of the accident, Brock had worked at Knight's gravel pit in Nicholson, Mississippi. (R. 833.) That evening, Brock went over to Port Bienville in Pearlington, Mississippi, to collect his pay. (R. 833.) Upon arrival in Pearlington, Brock took a shower, cleaned up, and changed clothes. It was here at Knight's operation in Pearlington that Brock was able to use the services of a trailer on the premises which contained living accommodations and a kitchen, complete with a table and groceries. Brock was living at this trailer at the time of the accident.

After having been paid, and following a change of clothes and cleaning up, Brock decided to go to Slidell, Louisiana. (R. 834.) Brock then went by a friend's house to see her. Brock proceeded to a restaurant to eat dinner and drink beer. (R. 834.) After eating, Brock stopped at a Time-Saver convenience store, purchased some more beer, and then headed back to Mississippi.

(R. 834.) Subsequently, Brock crossed the center line on Highway 90 and collided with Ms. Buice's vehicle, resulting in her death. (R. 834.)

The accident occurred late Friday night on July 6, 1984, when Brock, driving his own personal pickup, and driving while intoxicated, drove down the wrong side of Highway 90 and struck Ms. Buice's vehicle, causing her death.

The Buice estate initially filed a complaint against Steve Knight, Jr. Steel Fabricators, Inc. and Time-Saver Stores, Inc. on August 17, 1987, alleging that Knight was liable for the actions of Brock and that Brock was acting in the course and scope of his employment at the time of the accident. (R. 867.) The complaint alleged that Brock was intoxicated or under the influence of alcohol at the time of the accident and that Brock's negligence was the cause of Buice's death. (R. 867.) The Buice estate was allowed to file an amended complaint by order dated December 8, 1988. (R. 867.) An amended complaint was filed on December 27, 1988, adding Knight individually, d/b/a Steve Knight, Jr. Steel Fabricators, Inc., as Defendant. (R. 867.)

Floyd Logan, counsel for the Buice estate, sent a copy of the complaint in the Buice action to Burt Young, local agent for U.S.F. & G., who forwarded a copy of the complaint to U.S.F. & G. on or about April 27, 1988. (R. 868.) U.S.F. & G. began investigating the claim and retained long-time insurance defense attorney Stanford Morse in August of 1988, as counsel to defend Knight. (R. 868.) Morse filed an answer on behalf of Knight on August 12, 1988, admitting Brock's negligence but denying that he was acting in the scope of employment at the time of the accident. (R. 868.)

Regarding coverage by U.S.F. & G., the business auto policy issued to Knight contained an endorsement JXN154-B, which provided that:

> It is agreed that the unqualified word "insured" wherever it is used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used *solely for business purposes in connection with your business*. (Emphasis added).

(R. 850.) The above restrictive non-owned vehicle endorsement would have provided coverage only if Brock's vehicle was being used "solely" for the business purposes of Knight at the time of the accident.

U.S.F. & G.'s claims personnel continued their investigation of the claim in light of the various policies issued to Knight. Forrest Holder, Sr., former claims office supervisor for U.S.F. & G., testified at the subsequent garnishment trial[1] that he received notice of the Buice accident in 1988 and determined that no coverage was afforded the Brock vehicle under any of the policies in effect at the time. (R. 839.) Holder stated that the Brock vehicle was not listed on the trucker's policy, or the

---

1. The Estate of Mary Virginia Buice obtained a default judgment against Knight for the sum of $1,173,591.00. The Buice Estate then instituted garnishment proceedings against U.S.F. & G. and Chicago based upon the policies of insurance issued to Knight. After a two day trial, the District Court released U.S.F. & G. and Chicago from the garnishment action after finding no coverage under the policies. The garnishment action is presently on appeal to the U. S. Court of Appeals for the Fifth Circuit, Case No. 94-60384.

business auto policy. (R. 839.) He stated that the comprehensive general liability policy did not extend coverage to automobiles. Holder opined that the business auto policy's restrictive non-owned vehicle endorsement (JXN154-B) did not provide coverage because the vehicle was not being used solely for business purposes at the time of the accident. (R. 839.)

Darwin Ezell, a claims adjuster with twenty-seven years of experience at U.S.F. & G., stated that it was his determination that there was no coverage under the policies. (R. 840.) With respect to the information U.S.F. & G. possessed relative to the facts of the accident, Ezell stated that U.S.F. & G. had a copy of the investigating officer's report, of Brock's insurance policy, had knowledge of the facts of Brock's previous manslaughter case arising out of the same accident, along with copies of the three relevant policies issued to Knight at the time U.S.F. & G. determined that there was no coverage. (R. 840.)

Morse met with Knight and informed him that the insurance policies provided no coverage for the incident and told Knight that he would have to retain his own attorney. (R. 868.) Morse also sent a letter to Knight, dated September 21, 1988, advising him that U.S.F. & G. "does not insure the above referenced claim" and informed Knight that a motion to withdraw would be filed, and that Knight should file any written objections to the motion to withdraw with the United States District Court Clerk. (R. 868.) Morse filed his motion to withdraw as counsel for Knight on September 22, 1988. (R. 868.) The motion stated that after Morse appeared to afford Knight a defense, U.S.F. & G. determined that the business auto policy and trucker's policy provided no coverage on the vehicle involved in the accident. (R 868). Morse was allowed to withdraw as attorney of record for Knight on January 23, 1989.

Knight testified at the garnishment trial that he spoke to

attorney Joe Montgomery about the *Buice* lawsuit after Morse withdrew. (R. 869.) Knight testified that he brought all letters regarding the pending default to Montgomery's attention and apprised Montgomery that he could "do anything you need to do" on Knight's behalf in the suit. (R. 869.) Montgomery appeared as counsel for Knight at Burt Young's deposition held on October 24, 1989. (R. 869.) Montgomery also appeared at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (R. 869.) However, Montgomery appeared at the bench trial of the garnishment action and stated that he did not represent Knight during the *Buice* proceedings.

Montgomery wrote a demand letter to U.S.F. & G., with copies to Crystal Springs Insurance Agency and Floyd Logan, counsel for Buice, on February 8, 1989. Montgomery also sent follow up letters to U.S.F. & G. on subsequent dates. Morse responded to the February 9 letter by indicating that the identified policy did not cover the Buice claims. (R. 869.) Further letters to Montgomery from Morse clarified U.S.F. & G.'s position that coverage did not exist under the policies for the incident and that U.S.F. & G. had no duty to defend Knight. (R. 869-870.)

On March 28, 1989, the Buice estate, after having filed its amended complaint, filed a motion to strike Knight's answer to the initial complaint and for entry of default judgment against Knight. (R. 870.) Neither Knight nor his attorney, Joe Montgomery, took any action to protect his rights. The Court entered a default judgment in the amount of $1,173,591.00 against Knight on June 18, 1990. (R. 870.) The Magistrate Judge determined that Brock was acting in the scope of his employment at the time of the accident. However, the issue of coverage under the insurance policies was not adjudicated in that opinion.

The Buice estate then instituted a garnishment action

against U.S.F. & G. based on the insurance policies issued to Knight. Knight subsequently brought the present bad faith suit against U.S.F. & G. for alleged wrongful failure to defend in the *Buice* matter. The Knight bad faith action was later consolidated with the *Buice* garnishment action. (R. 166-167.) On or about December 14, 1992, the *Buice* garnishment action was severed from the *Knight* bad faith suit. (R. 626-627.) The garnishment action proceeded to trial before the District Court without a jury on December 14-16, 1992. (R. 829.)

The principle issue in the garnishment lawsuit was whether there was coverage under the U.S.F. & G. business auto policy. The trial court properly narrowed its focus to determine whether Brock's use of the non-owned vehicle was solely for business purposes in connection with Knight's business, sufficient to trigger coverage under the U.S.F. & G. business auto policy. (R. 849.) The Court held, after considering the evidence and testimony of witnesses that Brock was not using the truck solely for business purposes of Knight at the time the accident occurred. (R. 851.) Further, the District Court found that Brock was on a personal mission at the time of the accident, with no connection to his employment. (R. 851.) On April 20, 1994, the District Court entered its bench opinion in the garnishment action releasing U.S.F. & G. from the writ of garnishment after making a finding of no coverage under the business auto policy. (R. 829-851.) The garnishment action is currently on appeal awaiting oral argument in the Fifth Circuit.

On October 12, 1992, U.S.F. & G. filed its motion for summary judgment as to Knight's bad faith claims. (R. 416.) On November 16, 1994, the District Court granted summary judgment to U.S.F. & G. after finding that its actions in withdrawing its defense of Knight were reasonable according to law and did not rise to the level of malice or gross negligence and reckless disregard sufficient to trigger punitive damages. The

Court further held that U.S.F. & G. had an arguable reason to deny the claim at the time it made the decision to withdraw from Knight's defense. (R. 866-89.) On November 29, 1994, the District Court entered judgment dismissing Knight's action against U.S.F. & G. with prejudice. (R. 890-91.)

Knight appealed to the Fifth Circuit, and, on or about September 21, 1995, the Court of Appeals entered its judgment and opinion affirming the District Court's judgment. After Knight filed his petition for rehearing, the Fifth Circuit entered its order denying the petition on November 2, 1995. The present Petition for Writ of Certiorari was filed by Knight on or about January 30, 1996.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THE FIFTH CIRCUIT'S RULING BASED UPON WELL-SETTLED PRINCIPLES OF MISSISSIPPI INSURANCE LAW

The present controversy between an insured and his insurer is not the type of case worthy of this Court's limited judicial resources. The Fifth Circuit and the District Court both found under well-settled principles of Mississippi insurance law that U.S.F. & G. was entitled to summary judgment on Knight's bad faith claims. Knight's petition should be denied as this Court does "not ordinarily review the holding of a court of appeals on a matter of state law." *Pierson v. Ray*, 386 U.S. 547, 559 n. 12 (1967). Further, this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n. 13 (1986).

Essentially, Knight maintains the lower court misapplied FED. R. CIV. P. 56 along with Mississippi insurance law to the underlying facts. This Court should decline certiorari jurisdiction as such a writ "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

II.

FIFTH CIRCUIT PROPERLY ANALYZED KNIGHT'S CLAIMS UNDER FED. R. CIV. P. 56

Knight recites familiar passages about Rule 56 and contends that the lower court's granting of summary judgment somehow conflicts with prior rulings of this Court and other Courts of Appeals. Yet Knight fails to cite any factually analogous cases that contradict the lower court's ruling. As for the present cause of action, Knight fails to demonstrate any genuine issue of material fact sufficient to withstand summary judgment. As this Court has held:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In order to recover punitive damages in a bad faith action, Knight has the burden of proving that U.S.F. & G. "acted with (1) malice, or (2) gross negligence or reckless disregard for the

rights of others." *Hans Const. Co. v. Phoenix Assur. Co.*, 995 F.2d 53, 55 (5th Cir. 1993). "Where there is a legitimate or arguable reason for denial of the claim, the [punitive damages] issue should not be put to the jury." *Lewis v. Equity Nat. Life Ins. Co.*, 637 So. 2d 183, 185 (Miss. 1994). Further, "interpretation and construction of insurance policies is [sic] a matter of law, . . . and therefore, issues involving the duty to defend are particularly amenable to summary judgment." *First Southern Ins. Co v. Jim Lynch Ent. Inc.*, 932 F.2d 717, 719 (8th Cir. 1991).

The Fifth Circuit correctly affirmed the District Court's ruling that U.S.F. & G. had an arguable reason for denying coverage and a defense to Knight in the *Buice* action. Implicit within the Fifth Circuit's ruling was the District Court's previous determination in the garnishment action that there was no coverage for the Brock/Buice accident under the business auto policy's non-owned vehicle endorsement. More importantly, Knight was unable to show any evidence that U.S.F. & G. acted with malice or gross negligence or reckless disregard in denying coverage and a defense to Knight for the *Buice* action. Thus, Rule 56 mandates summary judgment on the punitive damages claim "because the non-moving party has failed to make a sufficient showing on an essential element of h[is] case with respect to which [h]e has the burden of proof." *Celotex*, 477 U.S. at 323.

III.

IN THE ABSENCE OF COVERAGE, U.S.F. & G. HAD NO DUTY TO DEFEND

In the absence of coverage, U.S.F. & G. had no duty to defend. In Part IV of the Relevant Business Auto Policy, No. 041146688, issued to Knight during the time of the accident, the language plainly states:

> We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy.

(R. 557.)

Regarding coverage, the business auto policy issued by U.S.F. & G. contained a non-owned vehicle endorsement, JXN154-B which provided as follows:

> It is agreed that the unqualified word "insured" wherever used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles or to operation of other automobiles while being used *solely for business purposes in connection with your business*. (Emphasis added.)

(R. 874.) Thus, U.S.F. & G. was contractually obligated to provide a defense for suits involving bodily injury or property damage that occurred through a non-owned vehicle, under the restrictive non-owned vehicle endorsement JXN154-B only if the non-owned vehicle was being used "solely for business purposes" in connection with Knight's business at the time of the accident. As stated before, the District Court specifically found in the garnishment action that there was no coverage for the Buice accident under the applicable business auto policy.

Knight has devoted much argument in his Petition regarding the extent of an insurer's duty to defend and the consequences of an alleged improper withdrawal of such defense (breach). However, a breach of duty to defend can occur only if there was a duty to defend in the first place. *Jones v. Southern Marine & Aviation Underwriters*, 888 F.2d 358, 362 (5th Cir. 1989). Although the duty to defend arises when a potential for coverage exists (*see Merchants Co. v. American Motorists Ins.*, 794 F. Supp. 611 (S.D. Miss. 1992)), the Fifth Circuit has held that:

> Nevertheless, this duty is not limitless: although the outer boundary of a policy's potential coverage may be expansive, an insurer's duty to defend ceases there.

Snug Harbor, Ltd. v. Zurich Ins., 968 F.2d 538, 545 (5th Cir. 1992). *See also, New Hampshire Ins. Co. v. Vardaman*, 838 F. Supp. 1132 (N.D. Miss. 1993) (insurer had no legal obligation to defend or indemnify insured under homeowner's policy where evidence showed that facts fell within policy exclusions from coverage).

In the absence of coverage for a particular claim, there can be no duty to defend said claim. Both the Fifth Circuit and the District Court found that at the time U.S.F. & G. attorney Stanford Morse withdrew as counsel for Knight there was no indication that the vehicle driven by Brock was covered under any of the U.S.F. & G. policies. The lower courts correctly held that since there was no coverage for the Brock/Buice accident, there was no duty upon U.S.F. & G. to defend Knight in the wrongful death action arising out of said accident.

IV.

KNIGHT SUFFERED NO PREJUDICE AS A RESULT OF U.S.F. & G.'S ACTIONS

Knight claims that the assumption of a defense by U.S.F. & G. prejudiced him following Stanford Morse's withdrawal. Knight contends that as a result of such prejudice, U.S.F. & G. was later estopped to assert any policy provision which would decline coverage or the obligation to defend. However, the estoppel and prejudice arguments were addressed by the District Court in its opinion following the garnishment action:

> An insurer may conduct the defense of a lawsuit against an insured until such time as the insurer discovers non-coverage. *Insurance*, 44 AM. JUR. 2d § 1423, p. 371. An insurer may be estopped from denying liability under a policy if the insurer's conduct results in prejudice to the insured. *Id.*, § 1428, p. 376. In this case, Knight was informed well in advance of the entry of the default judgment that U.S.F. & G. was withdrawing from his defense, as the company determined that there was no coverage for the incident in any of the policies in force at the time of the accident. In fact, Knight obtained the assistance of another attorney after Morse told Knight tnat U.S.F. & G. was withdrawing from the defense of the lawsuit. The unopposed default judgment was entered without testimony.
>
> If an insurer suspects non-liability due to lack

> of policy coverage, and plans to defend on an issue of non-coverage, it may be construed a breach of duty for the insurer to continue to represent the insured. *See Martin v. Travelers Indemnity Co.*, 450 F.2d 542 (5th Cir. 1971). In the instant case, the insurer began representation of the insured until U.S.F. & G. was able to determine that the policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that U.S.F. & G. would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to do "whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to U.S.F. & G. for Knight and appeared at depositions as his attorney. The Court cannot consider that U.S.F. & G.'s actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.

(R. 847-48.) The above discussion of U.S.F. & G.'s actions by the District Court clearly demonstrates an absence of prejudice towards Knight, especially since Knight was assisted by attorney Joe Montgomery prior to the entry of the default judgment.

Knight claims that U.S.F. & G. failed to conduct an adequate investigation before Morse withdrew from Knight's defense. This assertion may be easily disposed of as "the mere fact that an investigation of a claim is deficient or incompetent is not sufficient to establish malice, gross negligence or reckless

disregard of the rights of the insured." *Guy v. Commonwealth Life Ins. Co.*, 894 F.2d 1407, 1413 (5th Cir. 1990).

Knight maintains he was prejudiced because attorney Stanford Morse allegedly had a conflict of interest in representing Knight while being made aware of coverage issues by U.S.F. & G. during his representation of Knight. Both courts below found no merit to this claim of prejudice by Knight. In addition, Knight claims that the alleged conflict of interest should estop U.S.F. & G. from asserting a denial of coverage. However, it is well settled that "theories of waiver and estoppel cannot be used to extend policy coverage to subject matter outside of the coverage provided under the clear terms of the policy." *Employers Reinsurance v. Martin, Gordon & Jones*, 767 F. Supp. 1355, 1363 (S.D. Miss. 1991).

V.

ARGUABLE REASON PRECLUDES PUNITIVE DAMAGES

As the Mississippi Supreme Court has recently held, "[i]n insurance contract cases, '[t]he trial court is responsible for reviewing all evidence before it in order to ascertain whether the jury should be permitted to decide the issue of punitive damages.' " *Lewis*, 637 So. 2d at 185. In deciding whether an insurer had an arguable basis to deny insurance liability, Mississippi courts usually apply the directed verdict test. *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869 (5th Cir. 1991). "Under this test, unless the insured would be entitled to a directed verdict on the underlying insurance claim, an arguable reason to deny an insurance claim exists in most instances." *Dunn*, 927 at 873. As Brock was not using his personal vehicle solely for the business purposes of Knight on the night of the accident, the lower courts correctly granted and affirmed summary judgment

as no directed verdict could be granted to Knight on the coverage claim. The Fifth Circuit properly held that it was reasonable for U.S.F. & G. to conclude that there was no coverage under the business auto policy for the Buice accident. "Lack of coverage under the policy is a legitimate or arguable reason for denial of a claim." *Nationwide Mutual Fire Ins. Co. v. Dungan*, 634 F. Supp. 674, 684, n. 7, (S.D. Miss. 1986). Moreover, the District Court in the garnishment action specifically found there was no coverage for the Buice accident.

U.S.F. & G. had an arguable reason in declining coverage and refusing to provide a defense, thus, the Fifth Circuit properly held that the punitive damages claim should be dismissed. The arguable reason was simply that the truck owned and driven by Gary Brock at the time of the Buice accident was not being used "solely for the business purposes" of Steve Knight, Jr., so as to fall within the coverage of the non-owned vehicle endorsement to the business auto policy.

Contrary to Knight's representations, the District Court and the Fifth Circuit did not radically depart from the applicable substantive Mississippi insurance law in the context of FED. R. CIV. P. 56. The instant case is not deserving of this Court's precious time and resources. The lower courts' rulings do not conflict with rulings of other circuit courts, call into question the constitutionality of any statute, nor have they resulted in a radical departure from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND L. BROWN
Counsel of Record
A. KELLY SESSOMS
BROWN, WATT & BUCHANAN, P.A.
Attorneys for Respondent
3112 Canty Street
P. O. Box 2220
Pascagoula, Mississippi 39569-2220
(601) 762-0035